LECTURES ON CONSTITUTIONAL LAW - II

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LECTURES ON CONSTITUTIONAL LAW-II

Lecture - I

Introduction

Among the branches of Public Law, Constitutional Law is of the great importance. It is also known as "Municipal *Law*". It is supreme law of the land. It is supreme in the sense, any law or bye-law passed by the law making authority i.e. the supreme legislature (Parliament) or subordinate legislature or local body under the authority of delegated legislation must be in accordance/ in consonance with the provisions enshrined in the constitution. In other words, any law or by-law must be in accordance with the constitution. Otherwise, it is deleted being void and unconstitutional. Further, the Governmental machinery of a State comprising of three organs of the Government namely, the Executive, Legislature and Judiciary are to function in accordance with the provisions of the constitution. Similarly, many other aspects viz. elections, services, centre-state relations etc. In short, all matters with regard to the relationship between the state and people has been determined/ decided by the constitution of the state.

The term 'Constitution' literally means "a text or document containing the principles/rules, which determine/regulate the relations between the State/Government and the people." Constitutional law on the other hand means "a systematic arrangement of the body of rules embodied in constitution through the process of codification." In simple words, constitutional law is that branch of law, which provides for the working of the constitution of a State/ Country thereby successful functioning of the Government in a State/ Country. (The meaning and definition of the Constitution and Constitutional Law have been discussed in detail in the first part of this subject "Constitutional Law-I"). The Constitution of a

country may be oral or in writing, unitary or federal, rigid or flexible. The Constitution of India is written. It is partly unitary (Unitary = Powers Centralized in Centre/Union Government) and partly federal (Federal = Powers distributed between the centre and states and hence it is said to be quasi/semi-federal). The word "rigid" denotes, it is difficult to amend the constitution. While the word "flexible" denotes, the process of amendment involves simple process/ procedure. Indian constitution is both rigid and flexible. It is rigid in the sense, the amendment of certain provisions involves a critical task as it requires special majority i.e., two thirds majority of members present and voting in both houses (Lok Sabha and Rajya Sabha) or the Parliament and in addition to the special majority, the ratification by more than half of the states in certain cases/ amendments. Whereas the word 'flexible' denotes, an amendment can be made (an Amendment Act can be passed) by a simple majority of members present and voting.

The history of constitution can be traced back to the reign of Greeks and Romans. Britishers entered Indian soil in 1600 A.D. and ruled for a period of three and a half centuries i.e. up to 1950. The passing of the Government of India Act, 1919 was a first step forward towards the local self-Government. Further, the passing of the Government of India Act, 1935 was a second milestone and paved way for Independent India. The idea to have a constitution for India was coined/expounded for the first time in 1937 by M.N.Roy, a pioneer of Communist Movement and a radical humanist. In due course, the Constituent Assembly appointed a drafting committee on 29th August, 1947. It consisted of Dr.B.R.Ambedkar as the Chairman, Shri B.N.Rao as the Constitutional Advisor and 8 other members. The draft constitution was submitted on 29th November, 1949 and it came into force from 26-01-1950.

Indian Constitution is a written lengthiest constitution among all constitutions in the world. By the time, it came into force on

26th January, 1950, it originally comprised of 395 Articles divided into 22 Parts and 8 Schedules. In view of changing needs from time to time, several changes have been brought about in the Constitution by passing 99 Amendment Acts till 2014. (Some Articles viz. Articles 21.A, 31.A, 31.B, 31.C etc. have been inserted/added and some other articles viz. Articles 19(1)(f), 31 etc. have been repealed/omitted. After the passing of the Constitution (105th Amendment) Act, 2022, there are near about 500 Articles numbering Articles 1 to 395 divided into 25 Parts (excluding Part-VII and including Part-IV.A, IX.A, IX.B and XIV.A) and 12 Schedules.

The subject "Constitutional Law" for the purpose of study, has been split into two parts namely, Constitutional Law-I and Constitutional Law-II. Part-I to V.A have been discussed in detail in the first part of the book entitled "Constitutional Law-I". Part-I comprising of Articles 1 to 4 (including Article 2.A inserted by the Constitution (Thirty-fifth Amendment) Act, 1974, Section 2(b), w.e.f. 01-03-1975 and repealed by the Constitution (Thirty-sixth Amendment) Act, 1975, Section 5, w.e.f. 26-04-1975) lays down the provisions relating to the Union and its territory. It deals with the status of the Union territory, State territories and other territories acquired by the Government of India. Article 2 deals with the power of the Parliament with regard to admission and establishment/ formation of new states etc. Part-II containing Articles 5 to 11 lays down various provisions relating to acquisition and loss/termination of citizenship. It speaks about, who is a citizen of India? How an individual acquires and loses the citizenship? What are the rights and privileges an Indian Citizen is entitled to? And how the citizenship is lost/terminated etc.

Part-III containing Articles 12 to 35 (including Article 21.A instead by Constitution (Eighty-sixth Amendment) Act, 2002, Section 2, w.e.f. 01-04-2010, declaring right to education a fundamental right), 31.A, 31.B and 31.C (31.A and B were

inserted by Constitution (First Amendment) Act, 1951 and 31.C was inserted by the Constitution (Twenty-fifth Amendment) Act, 1971) is of great importance as it provides for various fundamental rights provided for/guaranteed under the Constitution. Among the fundamental rights, Articles 14, 19 and 21 dealing with Equality before Law & Equal Protection of Laws, Freedom of Speech & Expression and Right to Life & Personal Liberty are of utmost importance and described as "Golden Triangle". Part-IV containing Articles 36 to 51 (including 39.A and 43.A inserted by the Constitution (Forty-second Amendment Act, 1976) provide for Directive Principles of State Policy. Part-III and IV envisage the ideals and goals enshrined/embodied in the Preamble of the Constitution and to establish a welfare state. Part-IV.A containing Article 51.A imposes on citizens certain fundamental duties viz. to respect the National Anthem, National Flag, to cherish the noble ideals, which inspired our national struggle, to render national service, when called for; to conserve and preserve environment and wild life; to protect and safeguard public property etc.

The present subject entitled "Constitutional Law-II" deals with the second part of the subject containing Part-V to XXII of the Constitution. Part V containing Articles 52 to 151 (including 124.A, 124.B, 1245.C inserted by the Constitution (Ninety-ninth Amendment) Act, 2014. (The Act also brought about some changes/substituted certain provisions in Articles 124, 127, 128, 217, 222, 224 and inserted Article 224.A) 134.A and 139.A, inserted by the Constitution (Forty-second Amendment) Act, 1976) lay down various provisions relating to the Union dealing with the three organs of the Governmental machinery namely the Union Executive, the union Legislature and the Union Judiciary. Part-IV containing Articles 152 to 237 divided into 6 chapters lays down various provisions relating to the administration of States i.e the Executive, Legislature and Judiciary of the state. Chapter-I defines 'The State', Chapter-II deals with the Governor and council of

Ministers, Chapter-III deals with the state, Chapter-IV deals with the legislative power of the Governor, Chapter-V deals with the jurisdiction of High courts in the States and Chapter-VI provides for the jurisdiction of the subordinate courts. Part-VII containing Article 238 dealing with states in Part-B of the First Schedule was repealed by the constitution (Seventh Amendment) Act 1959; Section 29 and Schedule, w.e.f. 01-11-1956). Part-VIII containing Articles 239 to 242 (including Article.239A inserted by the Constitution (Fourteenth Amendment) Act, 1962, Article 239.AA inserted by the Constitution (Sixty-ninth Amendment) Act, 1991, Article 239.AB inserted by the Constitution (Sixty-ninth Amendment) Act, 1971 and excluding Article 242 repealed by the Constitution (Seventh Amendment) Act, 1956. Part-IX containing Articles 243 to 243.O lays down the provisions relating to the Panchayats (Part-IX - The territories in Part-D of the First Schedule and other territories not specified in that Schedule was repealed by the Constitution (Seventh Amendment) Act, 1956, Section 29 and Schedule and inserted by the Constitution (Seventy-third Amendment) Act, 1992, Section2, w.e.f. 24-04-1993). Part-IX.A containing Articles 243.P to 243.Z, 243.ZA to 243.ZG inserted by the Constitution (Seventy-fourth Amendment) Act, 1992, Section 2, w.e.f. 01-06-1993) lays down the provisions relating to the Municipalities viz. composition of Municipalities, Duration of Municipalities etc. Part-IX.B containing Articles 243.ZH to 243.ZT (inserted by the Constitution (Ninety-seventh Amendment) Act, 2011 dated 12-01-2012) lays down the provisions relating to the Co-operative Societies. Part-X containing Articles 244 and 244.A (inserted by the Constitution (Twenty-second Amendment) Act, 1969, Section 2, w.e.f. 25-09-1969) lays down two provisions relating to the Scheduled and Tribal Areas. Article 244 deals with the administration of Schedule Areas in the tribal areas. Article 244.A provides for the formation of an autonomous State comprising certain tribal areas in Assam and creation of local legislature or Council of Ministers or both therefor.

Part-XI containing Articles 245 to 263 lay down the provisions relating to Centre-State Relations i.e. the Relations between the Union and the States divided into two Chapters. Chapter-I containing Articles 245 to 255 deals with the legislative powers between the Centre and States. Articles 256 to 261 of the Chapter-II deals with Administrative relations. Article 262 under Chapter-II deals with the disputes relating to Waters and Article 263 makes provision for co-ordination between the states. Part-XII containing Articles 264 to 300.A divided into 4 Chapters lays down the provisions relating to Finance, Property and Suits. Chapter-I containing Articles 264 to 281 lays down the provisions relating to Finance. Articles 282 to 291 constitute miscellaneous provisions. Chapter-II containing Articles 292 and 293 relate to borrowing. Chapter-III containing Articles 294 to 300 lay down the provisions relating to Property, Contracts, Rights, Liabilities, Obligations and Suits. Chapter-IV containing Article 300.A provides for Right to Property as a legal right. Part XIII containing Articles 301 to 307 deals with Trade, Commerce and Intercourse within the Territory of India. Part-XIV containing Articles 308 to 323 (including 312.A inserted by the Constitution (Twenty-eighth Amendment) Act, 1972, Section 2 w.e.f. 29-08-1972) lays down the provisions relating to Services under the Union and States. Part-XIV.A containing Articles 323.A and 323.B (inserted by the Constitution (Forty-second Amendment) Act, 1976, Section 46, w.e.f. 03-01-1977) lays down the provisions relating to Administrative Tribunals and Tribunals for other matters. Part-XV containing Articles 323 to 329.A (inserted by the Constitution (Thirty-ninth Amendment) Act, 1975, Section 4, w.e.f. 10-08-1975) lays down the provisions relating to Elections in respect of Members of the Central and State Legislatives (viz. Lok Sabha, Rajya Sabha, Legislative Assembly and Councils of the States and Special Provisions as to Elections to Parliament in case of Prime Minister and Speaker).

Part-XVI containing Articles 330 to 342 including Article 338.A (inserted by the Constitution (Eighty-ninth

Amendment) Act, 2003, Section 3, w.e.f. 19-02-2004) makes Special Provisions relating to certain Special Classes by providing reservations to Scheduled Castes and Tribes and other categories in the Central and State Legislatures and Constitution of National Commissions to safeguard the welfare of these special categories. Part-XVII containing Articles 343 to 351 (including 350.A and 350.B inserted by the Constitution (Seventh Amendment) Act, 1956, Section 21, w.e.f. 01-11-1956) lays down the provision relating to official languages of the Union, States, Supreme Court and High Courts. Part-XVIII containing Articles 352 to 360 (including 350.A and 350.B inserted by the Constitution (Seventh Amendment) Act, 1956, Section 21, w.e.f. 01-11-1956) provides for Emergency Provisions. Part-XIX contains Articles 361 to 367 (including 361.A inserted by the Constitution (Forty-fourth Amendment) Act, 1978, Section 42, w.e.f. 20-06-1979 and Article 361.B inserted by the Constitution (Ninety-first Amendment) Act, 2003, Section 4, w.e.f. 01-01-2004) speaks about the "Miscellaneous Provisions". Part-XX containing Article 368 deals with the powers of the Parliament with regard to the "Amendment of the Constitution". Part-XXI containing Articles 369 to 392 speaks about the "Temporary, Transitional and Special Provisions (including Article 371.A inserted by the Constitution (Twenty-second Amendment) Act, 1969, w.e.f. 01-12-1963), 371.B inserted by the Constitution (Twenty-second Amendment) Act, 1969, Section 4, w.e.f. 25-09-1969). Article 371.C (inserted by the Constitution (Twenty-seventh Amendment) Act, 1971, Section 5, w.e.f. 15-02-1972) Article 371.D (inserted by the Constitution (Thirty-second Amendment) Act, 1973, Section 3, w.e.f. 01-07-1974), Article 371.E (inserted by the Constitution (Thirty-second Amendment) Act, 1973, section 3, w.e.f. 01-07-1974), Article 371.F (inserted by the Constitution (Thirty-sixth Amendment) Act, 1975, Section 3, w.e.f. 26-04-1975), Article 371.G (inserted by the Constitution (Fifty-third Amendment) Act, 1986, Section 2, w.e.f. 20-02-1987), Article 371.H (inserted by the Constitution

(Fifty-fifth Amendment) Act, 1986, Section 2, w.e.f. 20-02-1987), Article 371.I (inserted by the Constitution (Fifty-sixth Amendment) Act, 1987, Section 2, w.e.f. 30-05-1987), Article 371.J (inserted by the Constitution (Ninety-eighth Amendment) Act, 2012, w.e.f. 01-01-2013) and 378.A (inserted by the Constitution (Seventh Amendment) Act, 1956, Section 24, w.e.f. 01-11-1956) and excluding 13 Articles from 379 to 391 were repealed by the Constitution (Seventh Amendment) Act, 1956, w.e.f. 01-11-1956. Finally, Part-XXII containing Articles 393 to 395 (including Article 394.A (inserted by the Constitution (Fifty-eighth Amendment) Act, 1987, Section 2, w.e.f. 09-12-1987).

In this book, selected topics as per syllabus prescribed by the relevant/appropriate authorities have been discussed in a lucid way from the examination point of view.

Lecture - II

The Union
(Part-V: Articles 51-151)

There are three main organs in the Governmental machinery of any State, namely, the Executive, Legislature and Judiciary. Part-V containing Articles 52 to 151 divided into five chapters lays down the provisions relating to these three organs in respect of the Union (the Union Government/Central Government) as stated hereunder—

I) The Union Executive (Articles 51-78 & Article 123)

1. The President of India – Position, Powers and Functions (Articles 52-62, 70 & 72).
2. The Vice-President of India (Articles 63-69).
3. The Council of Ministers and the Prime Minister of India (Articles 74 & 75) and
4. The Attorney General of India.

II) The Parliament – The Union Legislature (Articles 79-122) and

III) The Union Judiciary – The Supreme Court (Articles 124-147) (including 131.A, 134.A, 139.A and 144.A).

(I) THE UNION EXECUTIVE

Chapter-I containing Articles 52 to 78 of Part-V of the Constitution lays down the provisions relating to the Executive of the Union. Article 52 provides that there shall be a President of India. Article 53 deals with the Executive Power of the Union. Article 54 lays down the procedure for Election of the President of India. Article 55 lays down the manner of election of President of India. Article 56 lays down the term of office of President. Article 57 deals with eligibility for re-election of the President.

Article 58 deals with qualifications for election as President. Article 59 deals with conditions of President's office. Article 60 contains oath or affirmation by the President. Article 61 provides procedure for impeachment of the President. Article 62 deals with time of holding election to till vacancy in the office of President and the term of office of person elected to fill casual vacancy. Article 63 lays down the provisions for the Vice President of India. Article 64 provides the Vice President to be ex-officio Chairman of the Council of States. Article 65 deals with the Vice President to act as President or to discharge his functions during casual vacancies in the office, or during the absence of President. Article 66 provides Election of Vice President. Article 67 speaks about the term of office of Vice President. Article 68 speaks about time of holding election to fill vacancy in the office of Vice President and the term of office of person elected to fill casual vacancy. Article 69 speaks about oath or affirmation by the Vice President. Article 70 deals with discharge of President's functions in other contingencies. Article 71 deals with the matters relating to, or connected with, the election of a President or Vice President. Article 72 lays down Power of President to grant pardons, etc., and to suspend, remit or commute sentences in certain cases. Article 73 provides for extent of executive power of the Union. Article 74 lays down the provisions for council of ministers to aid and advice President. Article 75 deals with other provisions as to Ministers. Article 76 speaks about Attorney General of India. Article 77 deals with other provisions of business of the Government of India. Article 78 deals with the duties of Prime Minister as respects the furnishing of information to the President, etc.

The expression 'Executive Power' is not defined in the Constitution. Though, it is not possible to define the executive power, ordinarily, it connoted the residue of governmental functions that remained after legislative and judicial functions were taken away. Thus, the function, which does not fall/come within the

purview of the legislative or judicial field, falls within the purview/ meaning of the Executive.

It is not possible to give an exhaustive list of the functions of the executive. Executive functions comprise both the formulations of the policy as well as its execution. Under Article 73 of the Constitution, the executive power is not confined merely to administration of laws already enacted but it includes determination of the government policy, initiation of legislation, maintenance of law and order, promotion of social and economic welfare, the direction of foreign policy, in fact, the carrying on or supervision of the general administration of the state.

In Democracy, there are two types of Governments:

i) Parliamentary form of Government; and

ii) The Presidential form of Government.

The essence of the Parliamentary type of Government is that the head of the State is the Constitutional head and the real executive powers are vested in the Constitutional head and the real executive powers are vested in the Council of Ministers. In the Presidential form of Government, the President is not the nominal head but the real Executive Chief of the State.

Chapter-I containing Articles 52 to 78 of Part-V lays down the provisions relating to the Union Executive comprising of the President, Vice President, Council of Ministers headed by the Prime Minister of India and the Attorney General of India as stated below:

The Union Executive consists of the following heads:

1. The President of India (Articles 52-62, 70 & 72).
2. The Vice-President of India (Articles 63-69).
3. The Council of Ministers (Articles 74 & 75); and
4. The Attorney-General of India (Article 76).

1. THE PRESIDENT OF INDIA
(Position, Powers & Functions)
(Articles 52-62, 70 & 72)

According to ***Article 52 of the Constitution***, there shall be a President of India. He is the Executive head of the State. He exercises his powers directly or indirectly through the Council of Ministers, in accordance with the provisions of the Constitution.

In India, under the Parliamentary form of Government, the position of the President is similar to that of the crown in England. In other words, the President is the nominal head and the real power is vested in the Council of Ministers headed by the Prime Minister. His position is quite distinct from American President, who is the real executive.

Article 53 of the Constitution confers on the President of India, the executive powers of the Indian Union. The President is empowered to exercise the executive powers directly or through the officers subordinate to him. Article 73 runs as follows–

Article 74 of the Constitution deals with Council of Ministers to aid and advise President—

1. There shall be a Council of Ministers with the Prime Minister at the head to aid and advise the President who shall, in the exercise of his functions, act in accordance with such advice;

   [Provided that the President may require the Council of Ministers to reconsider such advice, either generally or otherwise, and the President shall act in accordance with the advice tendered after such reconsideration].

2. The question whether any, and if so what, advice was tendered by Ministers to the President shall not be inquired into in any court.

Regarding the extent of executive power of the Union, Article 73 of the Constitution of India provides:

1. Subject to the provisions of this Constitution, the executive power of the Union shall extend–
   a) To the matters with respect to which Parliament has power to make laws; and
   b) To the exercise of such rights, authority and jurisdiction as are exercisable by the Government of India by virtue of any treaty or agreement:

   Provided that the executive power referred to in sub-clause (a) shall not, save as expressly provided in this constitution or in any law made by Parliament, extend in any State to matters with respect to which the Legislature of the State has also power to make laws.
2. Until otherwise provided by Parliament, a State and any officer or authority of a State may, notwithstanding anything in this article, continue to exercise in matters with respect to which Parliament has power to make laws for that State such executive power or functions as the State or officer or authority thereof could exercise immediately before the commencement of this constitution.

Election of the President of India

Qualifications (Article 58): Article 58 of the Constitution lays down that—

1. No person shall be eligible for election as President unless he—
   a) is a citizen of India.
   b) has completed the age of 35 years, and
   c) is qualified for election as a member of the House of the People.
2. A person shall not be eligible for election as President, if he holds any office of profit under the Government of India or the Governor of any State or under any local or other authority subject to the Control of any of the said Governments.

In simple words, a person to be elected as the President of India, he–

i) Must be a citizen of India.

ii) Must have completed the age of 35 years.

iii) Must be qualified for election as a member of the House of the People; and

iv) Must not hold any source of profit from the Union or State Government or Local or other body.

Election of President

According to Article 54 of the Constitution of India, the President shall be elected by the members of an electoral college consisting of–

a) The elected members of both Houses of Parliament; and

b) The elected members of the legislative Assemblies of the States.

Explanation: In this Article and Article 55, State includes the National Capital Territory of Delhi and Union Territory of Pondicherry.

Manner of election of President: Article 55 of the Constitution of India provides that:

1. As far as practicable, there shall be uniformity in the scale of representation of the different states at the election of the President.

2. For the purpose of securing such uniformity among the States in inter se as well as parity between the states as a whole and the Union, the number of votes which each elected member of Parliament of the Legislative Assembly of each State is entitled to cast at such election shall be determined in the following manner:

   a) Every elected member of the Legislative Assembly of a State shall have as many Votes as there are multiples of

one thousand in the quotient obtained by dividing the population of the state by the total number of the elected members of the Assembly.

b) If, after taking the said multiples of one thousand, the remainder is not less than five hundred, then the vote of each member referred to in sub-section (a) shall be further increased by one.

c) Each elected member of either house of Parliament shall have such number of votes as may be obtained by dividing the total number of votes assigned to the members of the Legislative Assemblies of the State under sub-clauses (a) and (b) by the total number of the elected members of both Houses of Parliament, fraction exceeding one-half being counted as one and other fractions being disregarded.

3. The election of the President shall be held in accordance with the system of proportional representation by means of the single transferable vote and the voting at such election shall be by secret ballot.

Explanation: In this Article, the expression 'population' means "the population as ascertained at the last preceding census of which the relevant figures have been published:

Provided that the reference in this Explanation to the last preceding census of which the relevant figures have been published shall, until the relevant figures for the first census taken after the year 2026 have been published, be constructed as reference to the 1971 census."

The President of India is, thus, elected by method of indirect election by the elected members of both Houses of Parliament and Legislative Assemblies of the States. It is to be noted that the members of the Legislative Councils (the Upper House in the States) are not eligible to vote. Similarly, nominated members of

either House of Parliament or of the Legislative Assemblies of any State on the date of election of the President are not eligible to vote at the election of the President.

In **Re-President Election** ***(AIR 1974 SC 1681)***– it has been held that if an elected member of a Legislative Assembly of a State ceases at the date of election of the President to be an elected member due to dissolution of the Legislative Assembly he will not be eligible to be a member of the Electoral College and cannot cast vote at the election of the President. In this case, the Supreme Court has held that election of the President can be held even when due to the dissolution of a State Legislative Assembly under Article 356, its members are not eligible to cast vote at the election of the President.

According to Article 71(4) of the Constitution the election of a person as President shall not be called in question on the ground of the existence of any vacancy for whatever reason, among the members of Electoral College electing him.

As per Article 71(3) of the constitution, subject to the provisions of this Constitution, Parliament may by law regulate any matter relating to or connected with the election of a President or Vice President.

The following illustration makes it clear how the election of President takes place.

For Legislative Assembly of a State: The formula for determining the number of votes which every member of a legislative Assembly is

$$\frac{\text{Population of the state}}{\text{total number of elected members of the state Legislative Assembly}} \times \frac{1}{1000}$$

Suppose the population of a State 'X' is 20,000,000 and the number of elected members of the Legislative Assembly of that State is 200, the votes which an elected member of the Legislative

Assembly is entitled to cast on election of the President will be as follows:

$$\frac{20,000,000}{200} \times \frac{1}{1000} = 100$$

If there is any fraction and that fraction is one-half or above, it will be counted as one and if it is less than one-half, it will be ignored.

Thus each member of the Legislative Assembly will get 100 votes and the total votes cast by Legislative Assembly of State 'X' would be 100 X 200 = 20,000.

For members of Parliament: For example suppose total votes assigned to the members of all the Legislative Assemblies of the States are 77,00,000 and the number of elected members of both houses of Parliament is 700. Each elected member of either House of Parliament will be entitled to cast the following number of votes–

$$\frac{77,000,000}{700} = 1100$$

If there is any fraction and that fraction is one-half or above, it will be counted as one and if it is less than one-half, it will be ignored.

Mode of voting: President is elected with the system of proportional representation by means of the single transferable vote. A candidate will be elected as President as if he secures a minimum quota obtained by the following formula:

$$\frac{\text{Total valid votes cast at the election of the President}}{\text{Number of candidates contested to be elected as the President} + 1} + 1$$

Only one candidate to be elected as President. Suppose the total valid votes cast at the election of the President is 40,000.

A candidate to be elected has to acquire the votes

$$= \frac{40,000}{1 + 1 = (2)} + 1 = 20,001$$

Suppose there are three candidates and secured the following votes:

A = 15,000

B = 18,000

C = 7,000

No candidate secured the minimum quota of 20,001, A candidate who has secured least number of votes will be eliminated and his votes will be distributed among A and B in accordance with the second preference indicated on the ballot paper recorded in his favour. Hence C is eliminated.

Suppose the second preference vote indicated on the ballot papers recorded in favour of C is as follows:

A = 5,500

B = 1,500

These votes will be added to the first preference votes of A and B and thereafter it will be as follows:

15,000 + 5,500 = 20,500

18,000 + 1,500 = 19,500

A will be declared as elected as he has secured the minimum quota of 20,001 votes although he has secured fewer first preference votes than B.

Re-election of President: According to Article 57 of the constitution a person who holds or who has held office as President shall, subject to the other provisions of this constitution be eligible for re-election to that office.

Salary & Emoluments: His salary fixed at present is Rs.50,000/- per month and is enhanced to Rs.1,50,000/- per month through the President's Emoluments and Pensions (Amendment) Act, 2008. In addition to the salary he is provided with rent free accommodation and is entitled to an annual pension of Rs.3,00,000/-. He is permitted to spend up to Rs.15,26,000/- towards travel, entertainment, discretionary grants and other allowances, which are determined by Parliament by law from time to time. He holds office for a term of five years (Article 56).

Term of Office: Article 56 of the Constitution of India provides that–

1. The President shall hold office for a term of five years from the date on which he enters upon his office: Provides that–
   a) The President may, by writing under his hand addressed to the Vice President, resign his office.
   b) The President may, for violation of the Constitution, be removed from office by impeachment in the manner provided in Article 61.
   c) The President shall, notwithstanding the expiration of his term, continue to hold office until his successor enters upon his office.
2. Any resignation addressed to the Vice President under clause (a) of the proviso to clause (1) shall forthwith be communicated by him to the speaker of the House of the People.

As per Article 65(1) of the Constitution, in the event of the occurrence of any vacancy of the office of the President by reason of his death, resignation or removal or otherwise, the Vice President shall act as President until the date on which a new President elected enters upon his office. In the absence of the Vice President, the Chief Justice of India and in his absence the senior-most Judge of the Supreme Court of India shall discharge the functions of the

President until a new President is elected as per President (discharge of function) Act, 1969.

Procedure for Impeachment, Removal of the President (Article 61): Article 61 of the Constitution lays down the procedure for the impeachment of the President. It (Article 61) reads as follows–

1. When a President is to be impeached for violation of the Constitution, the change shall be preferred by either House of Parliament.
2. No such change shall be preferred unless:
   a) The proposal to prefer such change is contained in a resolution which has been moved after at least fourteen days' notice in writing signed by not less than one-fourth of the total number of members of the House has been given of their intention to move the resolution, and
   b) Such resolution has been passed by a majority of not less than two-thirds of the total membership of the House.
3. When a charge has been so preferred by either house of Parliament, the other House shall investigate the charge or cause the charge to be investigated and the President shall have the right to appear and to be represented at such investigation.
4. If as a result of the investigation a resolution is passed by a majority of not less than two-thirds of the total membership of the House by which the charge was investigated or caused to be investigated, declaring that the charge preferred against the President has been sustained, such resolution shall have the effect of removing the President from his office as from the date on which the resolution is so passed.

The procedure for impeachment of the President of India is similar to that of the procedure prescribed for the impeachment of the President of U.S.A and Article-II, Section 4 of the Constitution of U.S.A.

The President of India can be removed from his office by a process of impeachment for the 'violation of the Constitution'. The impeachment charge against him may be initiated by either House of Parliament. The charge must come in the form of a proposal contained in a resolution signed by not less than 1/4th of the total number of the members of the House and moved after giving at least 14 days' advance notice. Such a resolution must be passed by a majority of not less than 2/3rd of the total membership of the House. The charge is then investigated by the other House. The President has right to appear and to be represented at such investigation. If the other House after investigation passes a resolution by 2/3rd majority declaring that the charge is proved, such resolution shall have the effect of removing the President from his office from the date on which the resolution is so passed.

Vacancy in the Office of the President: A vacancy in the office of the President may be caused in any of the following ways:

a) On the expiry of his term of five years (Article 56).

b) By his death (Article 65(1)).

c) By his resignation (Article 65(1)).

d) On his removal by impeachment (Article 61).

e) Otherwise e.g.: on the setting aside of his election as President (Article 65(1)).

Temporary Absence (Article 65(2)): If the President temporarily unable to discharge his function owing to his absence from India, illness or any other cause, the Vice President shall discharge his functions under the date on which the President resumes his duties (Article 65(2)).

Privileges of the President (Article 361): Article 361 of the Indian Constitution provides the following privileges to the President of India:

1. The President shall not be answerable to any court for the exercise and performance of the powers and duties of his office

or for any act done or purporting to be done by him in the exercise of those powers and duties. However, the conduct of the President may be brought under review by any court, tribunal or body appointed or designed by either House of Parliament for the investigation of the charge in impeachment proceedings. Thus the immunity afforded to the President will not restrict the right of any person to bring suit against the Government of India.

2. No criminal proceedings whatsoever shall be instituted and continued against the President in any court during the term of office.
3. No process for the arrest or imprisonment of the President shall be issued from any court during his term of office.
4. No civil proceedings in which relief is claimed against the President shall be instituted during the term of office in any court in respect of any act done or purporting to be done by him in his personal capacity whether before or after he had entered upon his office until—
   a) a notice in writing has been given to the President;
   b) two months have passed after the service of such notice; and
   c) the notice states the nature of proceeding, the cause of action, the name, residence and description of the party taking the proceedings and the relief claimed.

Position of the President: The Constitution confers on the President, very vast powers. His position may be described with reference to his powers and functions as follows:

1. Executive Powers
   i) Military Powers
   ii) Diplomatic Powers
2. Legislative Powers
   i) Ordinance making powers
   ii) Pardoning Power

3. Emergency Powers (Articles 353-360).
4. Judicial Powers; and
5. Miscellaneous Powers.

1. Executive Powers (Article 77): Article 77 of the Constitution confers on the President as to conduct of business of the Government of India. It reads as follows–

1. All executive action of the Government of India shall be expressed to be taken in the name of the President.
2. Orders and other instruments made and executed in the name of the President shall be authenticated in such manner as may be specified in rules to be made by the President, and the validity of an order or instrument which is so authenticated shall not be called in question on the ground that it is not an order or instrument made or executed by the President.
3. The President shall make rules for the more convenient transaction of the business of the Government of India, and for the allocation among Ministers of the said business.

He is the executive head of the State. He is empowered to appoint:

i) The Prime Minister and other Ministers on his advice;
ii) Judges of the Supreme Court and the High Court;
iii) Governors of the State;
iv) Attorney General of India;
v) Chief Election Commissioner;
vi) Chairman and other Members of U.P.S.C.; and
vii) The Comptroller and Auditor General of India.

The executive powers of the President can be sub-divided into two heads namely–

i) Military Powers; and
ii) Diplomatic Powers.

i) **Military Powers:** He is the Supreme Commander of the Defence forces of the Country. However, this power is subject to regulation by law.

ii) **Diplomatic Powers:** As the head of the State, he sends and receives Ambassadors and other diplomatic representatives.

2. Legislative Powers: Legislative Powers means law making powers. In India, the law making power is vested in the Parliament. The President is a component part of the Parliament and enjoys extensive legislative powers. He resolves the conflict (as to an ordinary Bill) between both the houses by convening joint session (Article 108). Every Bill passed by both houses of the Parliament is to be sent to the President for his assent (Article 111). He has power to summon and prorogue the Parliament and he can dissolve the Lok Sabha (Article 85). The Legislative powers of the President can be sub-divided into two heads namely—

i) Ordinance Making Power; and

ii) Pardoning Power.

i) **Ordinance Making Power:** Article 123 of the Constitution confers on the President ordinance making power. When both the Houses of the Parliament are not in session, if he finds necessary to take immediate action, may issue an ordinance. Such ordinance shall have the same force as an Act, passed by the Parliament.

Limitations:

i) Ordinance can be issued only when both the Houses of Parliament are not in session. If one house is sitting, the President can issue ordinance as for making a law the concurrence of both Houses is necessary.

ii) The President must have been satisfied that under the existing circumstances immediate action was necessary. Here satisfaction of the President means the satisfaction of the Council of Ministers on whose advice he issues ordinances.

iii) The President can issue ordinance only in respect of those matters in connection with which the Parliament has power to make laws. Thus an ordinance cannot violate the fundamental rights.

The ordinance so issued shall have the same force and effect as an Act of Parliament it can thus repeal an Act of Parliament or another ordinance.

iv) The ordinance must be laid before both Houses of the Parliament.

The ordinance can be withdrawn by the President at any time. It has to be laid before both Houses of Parliament when the session starts. If the Parliament considers it and passes the law, that will become an Act and if the Parliament takes no action at all, it will lapse after the expiry of six weeks from the reassembly of the Parliament.

v) About satisfaction of the President, the Thirty-eighth Amendment Act, 1965 had inserted clause (4) in Article 123 providing that the satisfaction of the President shall be final and conclusive and shall not be questioned in any court on any ground. However, this clause 4 has now been omitted by the Constitution (Forty-fourth Amendment) Act, 1978 w.e.f. 20-06-1979.

In ***R.K.Garg v. Union of India (AIR 1981 SC 2139)***– it has been held that the Special Bearer Bonds (Immunities and Exemptions) Ordinance, 1981 was not *ultra vires* of Article 123 of the Constitution. The President is competent to issue an Ordinance amending or altering the tax laws.

In ***A.K.Roy v. Union of India (AIR 1982 SC 710)***– it has been held that the National Security Ordinance is valid and not violative of Article 14 and the ordinances issued by the President under Article 123 stand on the same footing as laws passed by legislatures.

ii) **Pardoning Power:** Article 72 of the Constitution empowers the President to grant pardon in respect of the sentence for being convicted of an offence and to suspend remit or commute sentences in certain cases. It reads as follows:—

1. The President shall have the power to grant pardons, reprieves, respites or remissions of punishment or to suspend, remit or commute the sentence of any person convicted of any offence–

a) In all cases where the punishment or sentence is by a Court Martial;

b) In all cases where the punishment or sentence is for an offence against any law relating to a matter to which the executive power of the Union extends;

c) In all cases where the sentence is a sentence of death.

2. Nothing in sub-clause (a) of clause (1) shall affect the power conferred by law on any officer of the Armed Forces of the Union to suspend, remit or commute a sentence passed by a Court martial.

3. Nothing in sub-clause (c) of clause (1) shall affect the power to suspend, remit or commute a sentence of death exercisable by the Governor of a State under any law for the time being in force.

3. Emergency Powers (Articles 352-360): Part XVIII of the Indian Constitution containing Articles 352 to 360 lays down the provisions relating to Emergency Powers of the President. Emergency may be proclaimed under three heads as follows:

i) National Emergency (Article 352);

ii) State Emergency (Article 356) and

iii) Financial Emergency (Article 360).

(For details refer Lecture-X Emergency Provisions.)

2. THE VICE-PRESIDENT OF INDIA (Articles 63-69)

According to Article 63 of the Constitution, there shall be a Vice-President of India. In the event of the occurrence of any vacancy in the office of the President by reason of his death, resignation or removal, or otherwise, the Vice-President shall act as the President until the date on which the new President, elected in accordance with the provisions of the Constitution to fill such vacancy, enters upon his office.

Qualifications (Article 66(3) & (4)): Articles 66(3), (4) provide that:

Article 66(3)– No person shall be eligible for election as Vice President unless he—

a) Is a citizen of India;

b) Has completed the age of thirty five years; and

c) Is qualified for election as a member of the Council of States.

Article 66(4)– A person shall not be eligible for election as Vice President if he holds any office of profit under the Government of India or the Government of any State or under any local or other authority subject to the control of any of the said Governments.

Explanation: For the purpose of this Article, a person shall not be deemed to hold any office of profit by reason only that he is the President or Vice President of the Union or the Governor of any State or is a Minister either for the Union or for any State.

The Presidential and Vice Presidential Election (Amendment) Act, 1994, provides that the name of the candidate for the Vice President must be proposed by 20 electors and be seconded by 20 electors. A Vice President candidate is also required to deposit a security deposit of Rs.15,000/-

As per Section 4 of the Representation of the People Act, 1951, a citizen can be elected as Vice President of India only when he is registered as a voter in any Parliamentary Constituency.

As per Indian Constitution, any citizen of India is eligible to be elected as Vice President of India and it is not necessary that he should be a born citizen of India as in the case of some democratic States.

Term of Office (Article 67): Article 67 provides for the term of office of the Vice President of India as five years. It reads as follows–

a) A Vice President may, by writing under his hand addressed to the President, resign his office.

b) A Vice President may be removed from his office by a resolution of the Council of States passed by a majority of all the then members of the Council and agreed to by the House of the People; but no resolution for the purpose of this clause shall be moved unless at least fourteen days' notice has been given of the intention to move the resolution.

c) A Vice President shall, notwithstanding the expiration of his term, continue to hold office until his successor enters upon his office.

Salary of the Vice President: Salaries and Allowances of Officers of Parliament (Amendment) Act, 2008 raised the salary of the Vice President to Rs.1,25,000/- per month from Rs.40,000/- per month.

When the Vice President acts as President, he gets the emoluments of the President; otherwise, he gets the emoluments of the Chairman of the Council of States (Rajya Sabha/Upper House).

Removal of Vice-President (Article 67(b)): The Vice-President may be removed from his office by a resolution of the Rajya Sabha passed by a majority of all the members of the Rajya Sabha and agreed to by the Lok Sabha. However, no resolution for the removal of the Vice-President shall be moved in the Rajya Sabha unless at least fourteen days' notice has been given of the intention to move the resolution.

Functions of the Vice-President: The Vice-President of India shall be Ex-Officio Chairman of the Rajya Sabha (Article 64). His normal function is to preside over meeting of the Rajya Sabha. But since he is not the member of the Rajya Sabha, he has no right to vote. His importance in the Constitution is that whenever any vacancy occurs in the office of the President, he acts as President, until a new President is elected. Article 75 provides that when a vacancy occurs in the office of the President by reason of his death, resignation or removal or otherwise, the Vice-President shall act as President until the date on which a new President is elected to fill such vacancy. Clause (2) of Article 65 says that when the President is unable to discharge his functions owing to absence, illness or any other cause the Vice-President shall discharge his functions until the date on which President resumes his duties.

3. THE COUNCIL OF MINISTERS (Articles 74 & 75)

Articles 74 and 75 of the Indian Constitution lay down the provisions relating to the Council of Ministers of the Union of India. According to Article 74, there shall be a Council of Ministers headed by the Prime Minister for the Union of India. Article 75 empowers the President to appoint the Prime Minister and other Union Ministers on the advice of the Prime Minister. Articles 74 and 75 read as follows–

Council of Ministers to aid and advise President (Article 74) [Subs. By the Constitution (forty-second Amendment) Act, 1976, Sec.13, for clause 91) (w.e.f. 03-01-1977):

(1) There shall be a Council of Ministers with the Prime Minister at the head to aid and advise the President who shall, in the exercise of his functions, act in accordance with such advice.

[Provided that the President may require the Council of Ministers to reconsider such advice, either generally or otherwise, and the President shall act in accordance with the advice tendered after such reconsideration.]

(2) The question whether any, and if so what, advice was tendered by Ministers to the President shall not be inquired into in any court.

Other provisions as to Ministers (Article 75):

(1) The Prime Minister shall be appointed by the President and the other Ministers shall be appointed by the President on the advice of the Prime Minister.

(1.A) The total number of ministers, including the Prime Minister, in the Council of Ministers shall not exceed fifteen per cent of the total number of members of the House of the People.

(1.B) A member of either House of Parliament belonging to any political party who is disqualified for being a member of that House under paragraph 2 of the Tenth Schedule shall also be disqualified to be appointed as a Minister under clause (1) for duration of the period commencing from the date of his disqualification till the date on which the term of his office as such member would expire or where he contests any election to either House of Parliament before the expiry of such period, till the date on which he is declared elected, whichever is earlier.

(2) The Ministers shall hold office during the pleasure of the President.

(3) The Council of Ministers shall be collectively responsible to the House of the People.

(4) Before a Minister enters upon his office, the President shall administer to him the oaths of office and of secrecy according to the forms set out for the purpose in the Third Schedule.

(5) A Minister who for any period of six consecutive months is not a member of either House of Parliament shall at the expiration of that period cease to be a Minister.

(6) The salaries and allowances of Ministers shall be such as Parliament may from time to time by law determine and, until

Parliament so determines, shall be as specified in the Second Schedule.

In India, there is Parliamentary form of Government and in the Parliament form of Government; the Council of Ministers is the foundation of the State. The main function of the Council of Ministers is to execute the laws passed by Parliament. It controls and supervises the different departments of public administration.

Article 74(1) of the Indian Constitution provides that, there shall be a Council of Ministers with the Prime Minister as its head to aid and advise the President in the exercise of his functions. According to Article 75(1) the Prime Minister is appointed by the President and the other Ministers are appointed on the advice of the Prime Minister. A member of either house of the Parliament is appointed as the Minister. A non-member also can be inducted/ included in the Council of Ministers subject to the condition (constitutional requirement) that such member must get elected to either house of the Parliament within 6 months from the date of assuming office as the Minister.

In ***S.P. Anand v. H.D. Deve Gowda,*** **(AIR 1997 SC 272)**– the Supreme Court has held that a person who is not a member of either House of Parliament can be appointed by Prime Minister for six months. In this case the petitioner had challenged the appointment of Mr. Deve Gowda as the Prime Minister of India on the ground that at the time of appointment he was not a member of either House of Parliament. On plain reading of Article 75(5) it is clear that the Constitution makers desired to permit a person who was not member of either House of Parliament to be appointed a Minister for a period of six consecutive months and if during the said period he is not elected to either House of Parliament he will cease to be a Minister.

The Council of Ministers consists of three categories of Ministers– Ministers of Cabinet rank, Minister of State and Deputy Ministers. The Cabinet rank Ministers are the heads of their

departments. All Cabinet Ministers are not members of the Cabinet. They attend the meetings of the Cabinet when specially invited by the Prime Minister and when the matter concerning their department is discussed by the Cabinet.

There is no mention of 'Deputy Prime Minister' in our Constitution. The Deputy Prime Minister, through called so, is just like other members of the Council of Ministers. Though he has been so describe as the Deputy Prime Minister, the Constitution does not confer on him any power of the Prime Minister.

The salaries and allowances of Ministers shall be such as Parliament may from time to time by law determine. The Ministers of State are formally of Cabinet status and are paid the same salary as the Cabinet Ministers and they hold independent charge of their department. The Deputy Ministers are paid lesser salary than the Cabinet rank Ministers and have no separate charge of a department. Their rank is to assist the Ministers with whom they are attached to in their administrative duties.

Liability or Responsibility of the Council of Ministers: The responsibilities of the Council of Ministers can be explained under the following three heads namely–

i) Collective Responsibility.
ii) Individual Responsibility; and
iii) Legal Responsibility.

i) **Collective Responsibility:** Article 75(3) of the Constitution, incorporates the principle of 'Collective Responsibility'. It lays down that "the Council of Ministers shall be collectively responsible to the House of people. It insists upon the Council of Ministers to work as a team and the decisions taken in the council are deemed to be decisions of all its members.

The Principle of collective responsibility is the essential characteristic, the very basis of the Parliamentary form of

Government. It requires the Executive to be answerable to the Legislature for anything or everything done by it in the affairs of the administration of the country.

In ***State of Karnataka v. Union of India (AIR 1978 SC 68)***– it has been observed that the object of collective responsibility is to make the whole body of persons holding ministerial collectively, or, if one may so put it, vicariously responsible for such acts of the others as are referable to their collective violation so that, even if any individual may not be personally responsible for it he will be deemed to share the responsibility with those who may have actually committed some wrong.

ii) **Individual Responsibility of Ministers:** The Council of Ministers is not only responsible collectively, but also all the Ministers concerned are liable and accountable individually. The Parliament can question each and every Minister with regard to their functioning and actions taken from his/her ministry/ department.

The principle of individually responsible to the head of the State is embodied in Article 75(2) thus: "The Minister shall hold office during the pleasure of the president."

iii) **Legal Responsibility:** With regard to the legal responsibility of the Ministers is concerned, there is specific provision in the Indian Constitution that the President acts through the Council of Ministers and leaves the matter to the President to make rules as to how his orders etc. are to be authenticated. Therefore, for the acts done by the President on the advice of the Minister, imposes no legal responsibility on that Minister.

However, the principle of collective responsibility contained in Article 75(3) or Article 164(2) does not operate as a bar against the institution of inquiries by Commissions set up under the Commissions of Enquiry Act, 1952.

The Prime Minister of India

The Prime Minister is the head of the Council of Ministers (Article 74(1)). Article 75(1) says that "the Prime Minister shall be appointed by the President (Article 75(1)) and the other Ministers shall be appointed by the President on the advice of the Prime Minister." The President's choice to select Prime Minister is restricted to the leader of the party in majority in Lok Sabha or, a person who is in a position to win the confidence of the majority in that House. The President's discretion in such a situation is limited. Thus, when a single political party gains an absolute majority in the Lok Sabha and has an accepted leader, the President's choice of selecting a Prime Minister is a mere formality.

But in case of multiple party system as it prevails in India, if none is in a position to gain required majority, then the President can exercise his discretion and select the leader of any party who, in his opinion, can form a stable ministry. Under such a situation, the President has to follow the conventions that are followed in England.

They are–

i) In England, there is a convention of inviting the leader of the opposition to form a government in case of the defeat of the Government in the House.

ii) When there is no party with majority, the President should invite the largest single party in the Lok Sabha to form the Government.

iii) If two or more parties form a coalition before the election and secure the majority in the Lok Sabha he should invite the leader of the coalition to form the Government.

iv) The President should invite the leader of the coalition or alliance formed after the election, who has majority support.

v) If no coalition gets majority, then the President should invite a leader who gives some evidence of majority support, or the President satisfies that he may have majority then he asks him

to form the Government and get the confidence of the House within prescribed time.

To be appointed as Prime Minister, a person need not be a member of House of People only (Lok Sabha), but he should be a Member of Parliament i.e. member of either House. There is no legal bar that a Prime Minister must be a Member of Parliament before appointment. An outsider may be appointed as a Prime Minister but he must become a Member of Parliament within the period of six months. If he is not elected within the time mentioned above he is bound to resign. Such situation does not arise as he can easily be elected to Council of States (Rajya Sabha). Prime Minister Manmohan Singh is the member of Rajya Sabha.

Duties of the Prime Minister towards the President (Article 78): Article 78 lays down the following duties of the Prime Minister towards the President:

1. Duty to communicate to the President all decisions of the Council of Ministers relating to the administration of the affairs of the Union and proposals for legislation.
2. Duty to furnish such information relating to the administration of the affairs of the Union and proposals for legislation as the President may call for.
3. Duty to submit for the consideration for the Council of Ministers any matter on which a decision has been taken by a Minister but which has not been considered by the Council. The President may require the Prime Minister to do so. It is to ensure that the principle of collective responsibility operate effectively.

Powers of the Prime Minister

In India, Prime Minister enjoys enormous powers and occupies significant position. He/she is the 'Keystone of the Cabinet Arch'. Dr. Jennings points out he is rather the 'sun around which all planets revolve.' According to Prof. Taski, the Prime Minister

is the pivot of the whole system of Government. He shall be 'at the head of the Council of Ministers'. Hence, the other Ministers cannot function when the Prime Minister dies or resigns. Under such circumstances a new Prime Minister has to be appointed by the President.

The Prime Minister plays a predominant role not only in the Cabinet but also in the Parliament. He acts as a bridge between the President of India and the Union Council of Ministers. Some of his powers are stated below—

1. He is empowered to choose among the members of the Parliament as different Ministers of the Union Government and decide/distribute their portfolios.
2. The Prime Minister as the leader of the party in majority in the House of the People, takes important decisions on the National issue. Such Prime Minister is the sole authority in the Government. He is in-charge of coordinating the policy of the Government and has accordingly, a right of supervision over all the departments.
3. He performs the conventional powers such as:
   i) The power of selecting the other Ministers.
   ii) The power of allocation of business amongst the Ministers.
   iii) Power of summoning the meetings of the Cabinet and presides over them, communicates to the President all decisions of the Council of Ministers relating to the administration of the affairs of the Union and proposals for legislation etc. Because of wide powers given to him, he enjoys very good position.
   iv) As the head of the cabinet prepares the Union budget and moves demands for grants through Finance Minister. He formulates the foreign policy of India. Even the emergency powers of the President, are actually exercised by the Prime Minister through the Cabinet decisions.

4. THE ATTORNEY GENERAL OF INDIA (Article 76)

Article 76 of the Indian Constitution provides for the appointment of Attorney General of India and duties to be performed by him. It reads as follows–

1. The President shall appoint a person who is qualified to be appointed a Judge of the Supreme Court to be Attorney General for India.
2. It shall be the duty of the Attorney General to give advice to the Government of India upon such legal matters, and to perform such other duties of a legal character, as may from time to time be referred or assigned to him by the President, and to discharge the functions conferred on him by or under this Constitution or any other law for the time being in force.
3. In the performance of his duties the Attorney General shall have right of audience in all courts in the territory of India.
4. The Attorney General shall hold office during the pleasure of the President, and shall receive such remuneration as the President may determine.

The Attorney-General of India is appointed by the President. The Office of the Attorney General of India has been conferred special status by the Constitution. A person, who is qualified for the post of Supreme Court Judge can be appointed as the Attorney-General (Article 76(3)). He is the first Law Officer of the Government of India. He holds office during the pleasure of the President and shall receive such remuneration as the President may fix/determine. The power of the President to appoint and remove the Attorney General is subject to the advice of the Council of Ministers.

Functions of Attorney-General: He is to give advice to the Government of India on legal matters referred to him from time to time by the President. He attends to all duties of legal character,

which are assigned to him by the President. He is bound to discharge duties conferred on him by the constitution on any other law in force (Article 76(2)). He represents the Government of India in all cases before the Supreme Court. He may also be required to represent the Government of India in any High Court (where the Government of India is a party). He has right to speak and take part in proceedings of either House of Parliament without a right to vote (Article 88). He is also entitled to all the privileges and immunities as a member of Parliament (Article 105(3)).

He should appear before the Commissions and Tribunals such as inter-state river water tribunals on behalf of the union. He may appear for any State Government on its behalf in which the union is not a party. Even though, the Attorney General is entitled to private practice he shall not argue against the union Government when appointed by the State Government. He may while appearing for private parties opposes the State Government.

The Attorney General is prohibited to take appointment as a director in any company. He shall neither advise nor shall hold brief against the Government of India in cases is which he is called upon to advise the Government of India. He shall not defend accused person for criminal prosecution without the permission of the Government of India.

The office of the Attorney-General is a Political Office (like Minister of Law) in England and a few other countries. His position is similar/equal to that of the Minister of Law in India.

(II) THE UNION LEGISLATURE
(The Parliament)
(Articles 79-122)

The highest law making authority or the Supreme Legislature in India is the Parliament. Articles 79 to 122 of the Indian Constitution lay down the provisions relating to the Union Parliament. According to Article 79, "there shall be a Parliament for the Union, which shall consist of the President and two Houses

to be known respectively as the Council of States (Rajya Sabha) and the House of the People (Lok Sabha). The President is not a member of either house of the Parliament. He is an integral part of the Parliament and performs certain functions relating to its proceedings.

Constitution of Parliament (Article 79): There shall be a Parliament for the Union which shall consist of the President and two Houses to be known respectively as the Council of States and the House of the People.

Composition of Council of States/Upper House/Rajya Sabha (Article 80): Article 80 of the Constitution of India provides that–

1. The Council of States shall consist of:
   a) Twelve members to be nominated by the President in accordance with the provisions of clause (3) and
   b) Not more than two hundred and thirty eight representatives of the States and of the Union Territories.
2. The allocation of seats in the Council of States to be filled by representatives of the States and of the Union of Territories shall be in accordance with the provisions in that behalf contained in the Fourth Schedule.
3. The members to be nominated by the President under Sub Clause (a) of Clause (1) shall consist of persons having special knowledge or practical experience in respect of such matters as the following, namely– Literature, Science, Art and Social Service.
4. The representatives of each State in the Council of States shall be elected by the elected members of the Legislative Assembly of the State in accordance with the system of proportional representation by means of the single transferable vote.
5. The representatives of the Union Territories in the Council of States shall be chosen in such manner as Parliament may by law prescribe.

The Council of States (Rajya Sabha, the Upper House) shall be composed of not more than 250 members, of whom–

a) **Nomination:** The 12 nominated members shall be chosen by the President from distinguished persons having 'special knowledge or practical experience in literature, science, art and social service'. The nominated members do not participate in the election of the President of India.

b) **Representation of States and Union Territories:** Not more than 238 members shall be elected by the elected members of the Legislative Assembly of the State according to the system of proportional representation by means of the single transferable vote and the representatives of the Union Territories shall be chosen in such manner as Parliament may prescribe. Under this power Parliament has prescribed in Sections 27.A, 27.H of Representation of the People Act, 1950 that the representatives of Union Territories to the Council of States shall be indirectly elected by members of an electoral college for that Territory, in accordance with the system of proportional representation by means of the single transferable vote.

Though the maximum membership of Rajya Sabha is fixed at 250, at present, there are 245 (nominated 12 + representatives from States and Union Territories 233) members in the Council of States (Rajya Sabha).

The Council of States is permanent body and not subject to dissolution, but as nearly as possible one third members thereof shall retire as soon as may be on the expiration of every second year in accordance with the provisions made in that behalf by Parliament by law. Consequently, the term of a member of the Council of States is six years.

Composition of the House of the People/Lower House of the Parliament/Lok Sabha (Article 81): Article 81 of the Constitution of India Provides that–

1. Subject to the provisions of Article 331, the House of the People shall consist of:

   a) Not more than five hundred and thirty members chosen by direct election from territorial constituencies in the States, and

   b) Not more than twenty members to represent the Union Territories chosen in such manner as Parliament may by law provide.

2. For the purposes of sub-clause (a) of clause (1):

   a) There shall be allotted to each State a number of seats in the House of the People in such manner that the ratio between that number and the population of the State is, so far as practicable, the same for all States, and

   b) Each State shall be divided into territorial Constituencies in such manner that the ratio between the population of each constituency and the number of seats allotted to it is, so far as practicable, the same throughout the State:

   Provided that the provisions of sub-clause (a) of this clause shall not be applicable for the purpose of allotment of seats in the House of the people to any State so long as the population of that State does not exceed six million.

3. In this Article, the expression 'population' means the population as ascertained at the last preceding census of which the relevant figures have been published:

   Provided that the reference in this clause to the last preceding census of which the relevant figures have been published shall, until the relevant figures for the first census taken after the year 2026 have been published, be construed–

   i) For the purposes of sub-clause (a) of clause (2) and the proviso to that clause, as a reference to the 1971 census, and

   ii) For the purposes of sub-clause (b) of clause (2) as a reference to the 2001 census.

Readjustment after each census: Article 82 of the Constitution of India provides that "Upon the completion of each census, the allocation of seats in the House of the people to the States and the division of each State into territorial Constituencies shall be readjusted by such authority and in such manner as parliament may by law determine:

Provided that such readjustment shall not affect representation in the House of the people until the dissolution of the then existing House:

Provided further that such adjustment shall take effect from such date as the President may, by order, specify and until such readjustment takes effect, any election to the House may be held on the basics of the territorial constituencies existing before such readjustment:

Provided also that until the relevant figures for the first census taken after the year 2026 have been published, it shall not be necessary to readjust–

i) The allocation of seats in the House of the People to the States as readjusted on the basis of the 1971 census, and

ii) The division of each State into territorial constituencies as may be readjusted on the basis of the 2001 census, under this Article.

Representation of the Anglo-Indian Community in the House of the People: As per Article 331 of the Constitution of India "Notwithstanding anything in Article 81, the President may, if he is of opinion that the Anglo-Indian Community is not adequately represented in the House of the people, nominate not more than two members of that community to the House of the people."

Reservation of seats for Scheduled Castes and Scheduled Tribes in the House of the People: Article 330 of the Constitution of India Provides that–

1. Seats shall be reserved in the House of the People for:
   a) The Scheduled Castes;

b) The Scheduled Tribes except the Scheduled Tribes in the autonomous Districts of Assam, and

c) The Scheduled Tribes in the autonomous Districts of Assam.

2. The number of seats reserved in any State or Union Territory for the Scheduled Castes or the Scheduled Tribes under clause (1), shall bear, as nearly as may be, the same proportion to the total number of seats allotted to that State or Union Territory in the House of the People as the population of the Scheduled Castes in the State or Union Territory or part of the State or Union Territory, as the case may be, in respect of which seats are so reserved, bears to the total population of the State or Union Territory.

3. Notwithstanding anything contained in clause (2), the number of seats reserved in the House of the people for the Scheduled Tribes in the autonomous Districts of Assam shall bear to the total number of seats allotted to that State a proportion not less than the population of the Scheduled Tribes in the said autonomous Districts bears to the total population of the State.

Explanation: In this Article and in Article 332, the expression 'population' means "the population as ascertained at the last preceding census of which the relevant figures have been published:

Provided that the reference in this Explanation to the last preceding census of which the relevant figures have been published shall, until the relevant figures for the first census taken after the year 2026 have been published, be construed as a reference to the 2001 census.

Election to the House of People (Lok Sabha): According to Article 326 of the Constitution, election to the Lok Sabha will be conducted on the basis of adult suffrage i.e. every citizen, who has attained the age of 18 years (subject to disqualifications viz. non-residence, unsoundness of mind, corrupt or illegal practices) is entitled to exercise his franchise as a registered voter.

Attorney General in the House of the People: As per Article 88 of the Constitution of India, Attorney General of India shall have the right to speak in and otherwise to take part in the proceedings of the House of People, but shall not by virtue of Article 88 of the Constitution be entitled to vote.

Qualifications for Membership of Parliament: As per Article 84 of the Constitution of India, "A person shall not be qualified to be chosen to fill a seat in Parliament unless he–

a) Is a citizen of India, and makes and subscribes before some person authorised in that behalf by the Election Commission an oath or affirmation according to the form set out for the purpose in the Third Schedule.

(Form of oath or affirmation to be made by a Member of Parliament in Form III-B is as given below:

"1, A.B. having been elected (or nominated) a member of the Council of States (or the House of the people) do swear in the name of God/solemnly affirm that I will bear true faith and allegiance to the Constitution of India as by law established that I will uphold the sovereignty and integrity of India and that I will faithfully discharge the duty upon which I am about to enter").

b) Is, in the case of a seat in the council of States, not less than thirty years of age and, in the case of a seat in the House of the People, not less than twenty five years of age, and

c) Possesses such other qualification as may be prescribed in that behalf by or under any law made by parliament."

Parliament has made the Representation of the people Act, 1951 for this purpose. To become a member of the House of the people, a person is required as per the Representation of the People Act, 1951 to be an elector for some parliamentary Constituency in India and to become a Member of the Council of States, a person is required to be an elector for a Parliamentary Constituency in the concerned State or the Union Territory.

It is to be noted that no educational qualification has been prescribed for Membership of either the House of the people or the Council of States.

Disqualification for Membership of Parliament: Article 102 of the Constitution of India provides that–

1. A person shall be disqualified for being chosen as, and for being, a member of either House of Parliament
   a) If he holds any office of profit under the Government of India or the Government of any State, other than an office declared by Parliament by law not to disqualify its holder.
   b) If he is of unsound mind and stands so declared by a competent court.
   c) If he is an un-discharged insolvent.
   d) If he is not a citizen of India, or has voluntarily acquired the citizenship of a foreign State, or is under any acknowledgement of allegiance or adherence to a foreign State.
   e) If he is so disqualified by or under any law made by Parliament.

   Explanation: For the purpose of this clause a person shall not be deemed to hold an office of profit under the Government of India or the Government of any State by reason only that he is a Minister either for the Union or for such State.
2. A person shall be disqualified for being a member of either House of Parliament if he is so disqualified under the Tenth Schedule.

Disqualification for holding office of profit: The principle debarring holding of office of profit under the Government from being a member of Parliament is that such a person cannot exercise his functions independently of the executive of which he is a part.

The principle can be traced to developments in English constitution history, in the course of which it came to be established that the crown and its officers shall have no say in parliament.

The expression 'office of profit' has not been defined in the Constitution or in the Representation of the People Act, 1951. The courts have, however, laid down certain tests to determine as to which office is an office of profit.

In **S.S.Inamdar v. A.S.Andanappa** *(1971) 3 SCC 870)*– it has been held that the office of profit means an office to which some benefit is derived or might reasonably expressed to be made by the holder of the office. The actual making of profit is not necessary. Profit means pecuniary gain or any material gain.

In **Ravanna Subomna v. G.S.Kagg Resappa** (*AIR 1954 SC 653)*– the expression 'office of profit' is taken to mean an office capable of yielding pecuniary gain. It has been held that the amount of such profit is immaterial. But the amount of monetary benefit may be a material deciding factor whether the office which carries any profit.

In **Shibu Soren case** (*AIR 1987 Sc 1293)*– he was receiving honorarium of Rs.1750/- per month and daily allowance and car with driver at the expense of the State as the Chairman of the interim Jharkhand Area Autonomous Council. It was held that the amount caused pecuniary gain to the appellant and he was holding an office of profit under the Government. The appellant was therefore disqualified of being a member of Rajya Sabha.

In **Jaya Bachan v. Union of India** *(AIR 2006 SC 2119)*– Jaya Bachan's membership of Rajya Sabha was challenged as she was appointed as Chairman of the Film Development Council which carried with the monthly honorarium of Rs.5,000/- entitlement expenditure of Rs.10,000/- staff car with driver, telephones at office and residence, free accommodation and medical treatment facilities to self and family members, apart from other allowances. The membership of Jaya Bachan was disqualified after obtaining the

opinion of the Election Commissioner as required by Article 103(2). When Jaya Bachan challenged the order of disqualification, by claiming that the benefits and facilities given by the State Government was not received by her, the Supreme Court has held that an office of profit is an office which is capable of yielding a profit or pecuniary gain and when the pecuniary gain as 'receivable' in connection with the office then it becomes an office of profit irrespective of whether such pecuniary gain is actually received or not. The Supreme Court has held that the petitioner's disqualification for the membership of the Rajya Sabha is valid.

Officials of the Parliament

Officials of the Council of States: Chairman and Deputy Chairman of Council of States (Rajya Sabha):

Chairman: As per Article 89(1) of the Constitution "The Vice President of India shall be ex-officio Chairman of the Council of States."

However, as per Article 92 of the Constitution, at any sitting of the Council of States, while any resolution for the removal of the Vice President from this office is under consideration, the Chairman shall not, though he is present, preside and the provisions of clause (2) of Article 91 shall apply in relation to every such sitting as they apply in relation to a sitting from which the Chairman is absent. The Chairman shall have the right to speak in, and otherwise to take part in the proceedings of, the Council of States while any resolution for the removal of the Vice President from his office is under consideration in the Council, but notwithstanding anything in Article 100, shall not be entitled to vote at all on such resolution or on any other matter during such proceedings.

Deputy Chairman of the Council of States:

Election of Deputy Chairman: According to Article 89(2) of the Constitution, "The Council of States shall, as soon as may be, choose a member of the Council to Deputy Chairman thereof

and, so often as the office of Deputy Chairman becomes vacant; the Council shall choose another member to be Deputy Chairman thereof."

Power of the Deputy Chairman or other person to perform the duties of the office of, or to act as, Chairman: According to Article 91 of the Constitution of India–

1. While the office of Chairman is vacant or during any period when the Vice President is acting as, or discharging the functions of, President, the duties of the office shall be performed by the Deputy Chairman, or, if the office of Deputy Chairman is also vacant by such member of the Council of States as the President may appoint for the purpose.
2. During the absence of the Chairman from any sitting of the Council of States the Deputy Chairman, or, if he is also absent, such person as may be determined by the rules of procedure of the Council, or, if no such person is present, such other person as may be determined by the Council, shall act as Chairman.

Salaries and allowances of the Chairman and Deputy Chairman of the Council of States: As per Article 97 of the Constitution of India, there shall be paid to the Chairman and the Deputy Chairman of the Council of States such salaries and allowances as may be respectively fixed by Parliament by law and until provision in that behalf is so made, such salaries and allowances as are specified in the Second Schedule.

Officers of the House of the people (Lok Sabha) (Speaker and Deputy Speaker of the House of the people): According to Article 93 of the Constitution of India, the House of the people shall, as soon as may be, choose two members of the House to be respectively Speaker and Deputy Speaker thereof and, so often as the office of Speaker or Deputy Speaker becomes vacant, the House shall choose another member to be Speaker or Deputy Speaker, as the case may be.

Salaries of the Speaker and Deputy Speaker: As per Article 97 of the Constitution of India, there shall be paid to the Speaker and the Deputy Speaker of the House of the people, such salaries and allowances as may be respectively fixed by Parliament by law and until provision in that behalf is so made, such salaries and allowances as are specified in the Second Schedule (In second schedule it is stated that there shall be paid to the Speaker and the Deputy Speaker of House of the People such salaries and allowances as were payable to the Speaker and the Deputy Speaker of the Constituent Assembly of the Dominion of India immediately before such Commencement).

Under the Salaries and Allowances of Officers of Parliament Act 1953, as amended, the salary of the Speaker is Rs.40,000/- plus sumptuous allowance of Rs.1,000/- per men sum.

Power of the Deputy Speaker or other person to perform the duties of the office of, or to act as speaker: Article 95 of the Constitution of India provides that–

1. While the office of Speaker is vacant, the duties of the office shall be performed by the Deputy Speaker or, if the office of Deputy Speaker is also vacant, by such member of the House of the People as the President may appoint for the purpose.
2. During the absence of the Speaker from any sitting of the House of the People the Deputy Speaker or, if he is also absent, such person as may be determined by the rules of procedure of the House, or, if no such person is present, such other person as may be determined by the House, shall act as speaker.

Vacation and resignation of, and removal from, the offices of Speaker and Deputy Speaker: As per Article 94 of the Constitution of India, a member holding office as Speaker or Deputy Speaker of the House of the People–

a) Shall vacate his office if he ceases to be a member of the House of the people.

b) May at any time, by writing under his hand addressed, if such member is the Speaker, to the Deputy Speaker, and if such member is the Deputy Speaker, resign his office, and

c) May be removed from his office by a resolution of the House of the People passed by a majority of all the then members of the House.

Provided that no resolution for the purpose of clause (c) shall be moved unless at least fourteen days' notice has been given of the intention to move the resolution;

Provided further that, whenever the House of the people is dissolved, the speaker shall not vacate his office until immediately before the first meeting of the House of the people after, the dissolution.

Powers and Functions of Speaker: The office of the Speaker is one of great responsibility. The Speaker is expected to maintain impartiality and rise above the party interests. In England, there is a Convention that the member, after election as the Speaker resigns from his party. However, in India, he remains a member of the party. Once elected, he must rise above party interests. The Constitution of India contains provisions to pay his salary by charging on the Consolidated Fund of India and is not subject to the annual vote by Parliament for maintaining independence and impartiality of the speaker. He cannot be removed from his office except by a resolution passed by a special majority. He performs the following functions:

1. Speaker presides over the meetings of the House, and regulates proceedings of the House.
2. He maintains decorum in the House during debates.
3. He interprets the rules of the Parliament and decides all points of order and questions of procedure.
4. He can ask a member to withdraw from the House for any violation of the rules of the House.

5. He can suspend a member (s) for the whole session if a member disregards the authority and rulings of the Chair.
6. He can adjourn or suspend the session of the House in case of grave disorder.
7. He certifies whether a Bill is Money Bill or not His ruling on the above point is final and cannot be challenged in the court of law. According to Article 110(4) there shall be endorsed on every Money Bill when it is transmitted from the House of the People to the council of States and when it is presented to the President for assent with the certificate of the speaker signed by him, it is a Money Bill.
8. The speaker of the House of the people presides at the joint sitting of the both Houses of Parliament.
9. He cannot vote in the first instance but he can exercise a casting vote in the case of an equality of votes (Article 100(1)).
10. The speaker has to inquire into the genuineness of a letter of resignation given by a Member of the House of the people.
11. In case there is no quorum any time during a meeting of the House the speaker either adjourn the House or suspend the meeting until there is a quorum.
12. If any question arises as to whether a member of a House has become subject to any of the disqualifications under the Tenth Schedule of the Constitution, the question shall be referred to the Speaker of the House of the people (in case of the members of Council of states to the Chairman of the Council of States) whose decision shall be final. As per Para 7 of the Tenth Schedule, the decision of the presiding officers shall not be called into question in any Court of law. This paragraph has been declared invalid for want of ratification in accordance with the proviso to clause (2) of Article 368 as per majority opinion in ***Kihoto Hollohon v. Zachillhu*** **(1992) 1 SCC 309).**

Secretariat of Parliament: As per Article 98 of the constitution of India–

1. Each House of Parliament shall have a separate secretarial staff:

   Provided that nothing in this clause shall be construed as preventing the creation of posts common to both the Houses of Parliament.

2. Parliament may by law regulate the recruitment, and the conditions of service of persons appointed, to the secretarial staff of either House of Parliament.

3. Until-provision is made by Parliament under clause (2) the President may after consultation with the Speaker of the House of the people or the Chairman of the Council of States, as the case may be, make rules regulating the recruitment, and the conditions of service of persons appointed, to the secretarial staff of the House of the people or the Council of States, and any rules so made shall have effect subject to the provisions of any law made under the said clause.

Parliamentary Form of Government and Distinction between Parliamentary Form of Government and Presidential Form of Government

Parliamentary form of Government is also known as Cabinet form of Government or West Minister Model. In Parliamentary form of Government, the Crown or the President is the nominal head of the State. The real power is vested in the Council of Ministers headed by the Prime Minister. The Constitution of India establishes a Parliamentary form of Government, both at the Centre and in the States. For this purpose, our constitution makers followed the British model in toto.

In Parliamentary form of Government, the Council of Ministers is collectively responsible/answerable to the Lower House/Lok Sabha. The members of the Lok Sabha are elected by the people for a term of five years. In Lok Sabha Elections, different political

parties would be in the fray. The leader of the party, which won the majority is invited by the President to form the Government. He is called the 'Prime Minister'. On the advice of the Prime Minister, the other Ministers are appointed by the President. Similarly, in States/Provinces, the members of the Legislative Assembly (Lower House) are elected by the people for a term of five years. The leader of the political party, which won the majority and competent to form the stable Government is invited by the Governor to form the Government. He is called the 'Chief Minister'. On the advice of the Chief Minister, the other Ministers are appointed by the Governor. India and U.K. are the best examples for Parliamentary Form of Government.

Parliamentary Form of Government v. Presidential Form of Government

(Distinction between Parliamentary Form of Government and Presidential Form of Government)

1. In Parliamentary form of Government, the President or Governor is the nominal head and the real power is vested in the Cabinet i.e., Council of Ministers, which is answerable to the Lower House (Lok Sabha at Centre and Legislative Assembly in States). Whereas in the Presidential form of Government, the real executive head is the President. He (President) forms the Cabinet, and the Cabinet is directly accountable to him. E.g: U.S.

2. The Supporters of the Presidential form of Government argue that presidential system is free from sectional and party disputes. The President can devote his full time for the development of the country. The appointment of Charan Singh in 1979 and Chandrasekhar in 1991 as the Prime Ministers of India are the best examples for defects in Parliamentary system. But the supporters of Parliamentary system argue that the Parliamentary system has not failed, but the persons, who are called to work upon it (Parliamentary system), have failed.

3. In the Presidential form of Government, the President is free to choose the best talented persons for appointment of Ministers. But, in the Parliamentary system, the choice is restricted to the elected representatives only.

It is clear from the above that both the systems have merits and demerits as well. There has been a proposal to introduce Presidential form of Government in India to remove the defects in the Parliamentary form of Government.

Therefore, the Parliamentary system in India has been strengthened by passing of the anti-defection laws, through the constitutional amendments under Article 368, to remove such defections.

The Comptroller and Auditor General of India

Articles 148 to 151 of the Indian Constitution speak about the Comptroller and Auditor General of India. There shall be a Comptroller and Auditor General to examine the accounts of the Union and the States. He is appointed by the President of India, and is removable by impeachment as in the case of the removal of the Judge of the Supreme Court (Article 148).

The Comptroller and Auditor General of India is to be the guardian of the public purse and it is his duty to see that not a farthing is spent out of the consolidated fund of India or of a State without the authority of the appropriate Legislature under Article 148(1) of the Constitution, he is appointed by the President by warrant under his hand and seal. He is the impartial head of the audit and account system of India. In order to discharge his duty properly, his office is made independent of any control of the Executive.

Duties and Powers: Article 149 of the Constitution provides that the Comptroller and Auditor General shall perform such duties and exercise such powers in relation to the accounts of the union and of the state and of any other authority or body as may be

prescribed by or under any law made by parliament and, until provision in that behalf is so made, shall perform such duties and exercise such powers in relation to the accounts of the union and of the States as were conferred on or exercisable by the Auditor General of India immediately before the commencement of this constitution in relation to the accounts of the Dominion of India and of the provinces respectively.

Parliament has enacted the Comptroller and Auditor General (Duties, Powers and Conditions of Service) Act, 1971, which as amended in 1976, relieves him of his pre-constitution duty to compile the accounts of the union. Following are the powers and duties of the Comptroller and Auditor General of India.

i) To audit and report on all expenditure from the consolidated fund of India and of each state and each union territory having a legislative assembly as to whether such expenditure has been in accordance with the law.

ii) To audit and report on all expenditure from the contingency fund and public accounts of the union and of the states.

iii) To audit and report on all trading, manufacturing, profit and loss accounts, etc. kept by any department of the union or a state.

iv) To audit the receipts and expenditure of the union and of each state to satisfy himself that the rules and procedures in that behalf are designed to secure an effective check on the assessment, collection and proper allocation of revenue.

v) To audit and report on the receipts and expenditure of (i) all bodies and authorities 'substantially financed' from the union or state revenues; (ii) Government companies; (iii) other corporations or bodies, when so required by the laws relating to such corporations or bodies.

According to Article 150 of the Constitution the accounts of the union and of the states shall be kept in such form as the president

may on the advice of the comptroller and Auditor General of India prescribe.

As per Article 151(1) of the Constitution, the reports of the Comptroller and Auditor General of India relating to the accounts of the union shall be submitted to the President, who shall cause them to be laid before each house of Parliament while submitting reports of the comptroller and Auditor General to the Parliament the President shall enclose the report of the government called 'Action Taken Report'. The Action Report shall deal with all objections and recommendations made by the Auditor General Comptroller.

Parliament may issue directions to the Government on the manner in which the recommendations and objections should be complied.

According to Article 151(2) of the constitution, the reports of the comptroller and Auditor General of India relating to the accounts of a state shall be submitted to the Governor of the State, who shall cause them to be laid before the Legislature of the State.

In ***S.Suramanian Balaji v. Government of Tamilnadu & Others (AIR 2007 (NOC) 2001 (Mad).*** It has been observed that Auditor General can question the propriety of the expenditure only after it is incurred. He cannot question the policy of the Government to supply to the people free color T.Vs.

(III) THE UNION JUDICIARY (ARTICLES 124-147)

This topic covers the following heads–

1. Introduction.
2. Appointment of the Chief Justice of India.
3. Appointment of the Judges of the Supreme Court.
4. Qualifications.
5. Term of Office.

6. Salary and Allowances.
7. Removal of the Judge of Supreme Court.
8. Prohibition of Practice.
9. Appointment of Acting Chief Justice.
10. Adhoc Judges (Article 127).
11. Independence of Judiciary.
12. Jurisdiction of Supreme Court.
    1. Original Jurisdiction.
        i) Writ Jurisdiction (Article 32).
        ii) Exclusive Jurisdiction (Article 131).
    2. Appellate Jurisdiction.
        i) Interpretation of the Constitution (Article 132).
        ii) Civil Matters (Article 133).
        iii) Criminal Matters (Article 134).
        iv) Special Leave to Appeal (Article 136).
    3. Advisory Jurisdiction (Article 143).

(1) **Introduction:** There are three main organs of the Government/State namely, the Executive, the Legislature and the Judiciary. The administration of justice in India is vested in the Union Judiciary headed by the Supreme Court of India. Article 124 of Constitution provides for the establishment of Supreme Court, consisting of a Chief Justice of India and such other number of judges as prescribed/determined by the Parliament from time to time. By the time, Constitution came into force, the number of judges was seven (i.e. the Chief Justice of India and seven other Judges) as per Article 124(1) of the Constitution, which reads as follows–

"There shall be a Supreme Court of India Consisting of a Chief Justice of India and until Parliament by law prescribes a larger number of not more than seven other judges".

However, in view of population explosion resulting in increase in litigation and crime rate, the number of judges is to be increased from time to time. As such, the number of judges of the Supreme Court was increased to **twenty five** vide the Supreme Court (Number of Judges) Amendment Act, 1986 and the number further enhanced to **thirty** vide the Supreme Court (Number of Judges) Amendment Act, 2008. Now, the Supreme Court comprises of the Chief Justice of India and thirty other Judges.

(2) Appointment of Chief Justice of India: The President of India is empowered to appoint the Chief Justice of India on his/her own without consulting any one/authority. The practice is to appoint the senior-most Judge of the Supreme Court. On 25th April, 1973 (when, Mrs. Indira Gandhi was the Prime Minister of India) Justice A.N.Ray, the then Judge, Supreme Court was appointed as the Chief Justice superseding three judges, who were senior to Justice A.N.Ray. The appointment of Justice A.N.Ray as the Chief Justice gave room for lot of controversy and the Supreme Court of Bar Association condemned the appointment and the three senior judges namely, Justice Shelat, Justice Hegde and Justice Groven tendered resignations to their posts in protest of suppressing/out weighting their seniority.

The Government justified its action on the grounds of–

i) Under Article 124 of the Constitution has absolute discretion to appoint any one whom he finds suitable for the post of the Chief Justice of India.

ii) The Law Commission, in appointing the Chief Justice, suggested that merit should be judged and seniority should not only be the main consideration and the government followed the recommendations of the Law Commission in appointing the Chief Justice.

iii) The Executive should take into consideration the mental outlook or the social philosophy of Judges.

In 1977, the Janata Party won with huge majority and formed the Central Government. They revived the old practice of appointing the Chief Justice of the Supreme Court on the basis of seniority. The rule of seniority, though a mechanical rule, is beyond controversy and will ensure independence of Judiciary.

In **S.C.Advocate-on-Record Association v. Union of India** ***(1993) 4 SCC 441)***– the majority has held that the appointment to the office of the Chief Justice of India should be made on the basis of seniority, that is the senior-most Judge considered suitable to hold office be appointed as the Chief Justice.

The Constitution (Ninety-ninth Amendment) Act, 2014 (dated 31-12-2014) brought about drastic changes with regard to the appointment of the Chief Justice of India and other Judges of the Supreme Court and other Judges of the various High Courts in India. The Amendment Act of 2014 envisages the Constitution of the National Judicial Appointments Commission consisting of–

a) The Chief Justice of India as the Chairperson (Ex-officio);

b) Two senior most Judges next to the Chief Justice of India as members (Ex-Officio);

c) The Union Minister of Law and Justice as Member (Ex-officio);

d) Two eminent persons nominated by the committee headed by the Prime Minister, the Chief Justice of India and the leader of the opposition in the House of People (Lok Sabha)/the leader of the Single Largest Opposition Party in the House of the People.

One of the two nominated members shall belong to Scheduled Caste or Scheduled Tribe or other Backward Classes or Minorities or a woman [Article 124.A inserted by the Constitution (Ninety-ninth Amendment) Act, 2014 (dated 31-12-2014)].

(3) Appointment of Judges (Article 124(2)): Till the passing of the Constitution (Ninety-ninth) Amendment Act, 2014, dated 31st December 2015, the Chief Justice of Supreme Court was appointed by the President of India with the consultation of such

of the Judges of the Supreme Court and the High Courts' as he deems fit/necessary for the purpose. But, in appointing other Judges, the President shall always consult the Chief Justice of India.

In **S.P.Gupta v. Union of India,** popularly known as the **'Judges Transfer case'** *(AIR 1982 SC 149)*– it has been held that the ultimate power to appoint judges is vested in the Executive from whose dominance and subordination it was sought to be protected. It has been observed that the Executive should have primacy since it is accountable to the people while the Judiciary has no such accountability. The Supreme Court had abdicated its power by ruling that Constitutional functionaries had merely a consultative role and the power of appointment of Judges is 'solely and exclusively' vested in the Central Government.

In **S.C. Advocates on Record Association v. Union of India** *(AIR 1994 SC 268)* (Judges Transfer Case-II)– the nine judge bench of the Supreme Court overruled its earlier decision in S.P.Gupta v. Union of India. The Supreme Court has held that the initiation of the proposal for appointment in the case of Supreme Court must be by the Chief Justice of India and in the case of a High Court, by the Chief Justice of the High Court. In the event of conflicting opinions as to the person to be appointed as the Judge of the High Court or of the Supreme Court the opinion of the judiciary symbolized by the view of the Chief Justice of India, has primacy. The opinion of the Chief Justice of India which has primacy in the matter of recommendation for appointment to the Supreme Court has to be formed in consultation with a collegium consisting of the two senior-most *puisne* Judges of the Supreme Court who give their opinion in writing. Constitutional functionaries must act collectively in judicial appointments. No Judge can be appointed by the Union Government without consulting the Chief Justice of India. The Chief Justice is appointed by seniority.

The Supreme Court has made it clear that in exceptional cases alone, for stated strong cogent reasons disclosed to the Chief

Justice of India indicating that the recommendee is not suitable for appointment that appointment recommended by the Chief Justice of India may not be made. However, if the stated reasons are not accepted by the Chief Justice of India and the other Judges of the Supreme Court who have been consulted in the matter, on unanimous reiteration of the recommendation by the Chief Justice of India, the appointment should be made.

The Constitution (Ninety ninth Amendment) Act 2014, brought about drastic/substantial change in Article 124 with regard to the appointment of the Judges of the Supreme Court and various High Courts' in India as stated below:

99 Amendment Act:

Amendment of Article 124—

2 In Article 124 of the Constitution, in clause (2)–

(a) for the words "after consultation with such of the Judges of the Supreme Court and of the High Courts in the States as the President may deem necessary for the purpose", the words, figures and letter "on the recommendation of the National Judicial Appointments Commission referred to in Article 124A" shall be substituted;

(b) the first proviso shall be omitted;

(c) in the second proviso, for the words "Provided further that", the words "Provided that" shall be substituted.

Insertion of new Articles 124A, 124B and 124C:

3 After Article 124 of the Constitution, the following Articles shall be inserted, namely:-

National Judicial Appointments Commission– "124A. (1) There shall be a Commission to be known as the National Judicial Appointments' Commission consisting of the following, namely:

(a) the Chief Justice of India, Chairperson, ex officio;

(b) two other senior Judges of the Supreme Court next to the Chief Justice of India– Members, ex officio;

(c) the Union Minister in charge of Law and Justice– Member, ex officio;

(d) two eminent persons to be nominated by the committee consisting of the Prime Minister, the Chief Justice of India and the Leader of Opposition in the House of the People or where there is no such Leader of Opposition, then, the Leader of single largest Opposition Party in the House of the People– Members:

Provided that one of the eminent person shall be nominated from amongst the persons belonging to the Scheduled Castes, the Scheduled Tribes, other Backward Classes, Minorities or Women:

Provided further that an eminent person shall be nominated for a period of three years and shall not be eligible for re-nomination.

(2) No act or proceedings of the National Judicial Appointments Commission shall be questioned or be invalidated merely on the ground of the existence of any vacancy or defect in the constitution of the Commission.

Functions of Commission: 124B. It shall be the duty of the National Judicial Appointments Commission to–

(a) recommend persons for appointment as Chief Justice of India, Judges of the Supreme Court, Chief Justices of High Courts and other Judges of High Courts;

(b) recommend transfer of Chief Justices and other Judges of High Courts from one High Court to any other High Court; and

(c) ensure that the person recommended is of ability and integrity.

Power of Parliament to make law: 124C. Parliament may, by law, regulate the procedure for the appointment of Chief Justice of India and other Judges of the Supreme Court and Chief Justices

and other Judges of High Courts and empower the Commission to lay down by regulations the procedure for the discharge of its functions, the manner of selection of persons for appointment and such other matters as may be considered necessary by it."

(4) Qualifications (Article 124(3)): Article 124 (c) of the Indian Constitution prescribes qualifications for the position of the Judge, Supreme Court. A person to be appointed as the Judge of the Supreme Court must possess the following qualifications:

a) he must be a citizen of India, and

b) he has been for at least five years a Judge of a High Court or of two or more High Courts in succession; or

c) has been for at least ten years an advocate of a High Court or of two or more High Courts in succession; or

d) he is in the opinion of the President, a distinguished jurist.

A person to be appointed a Judge of the Supreme Court must possess two qualifications. Firstly, he must be a citizen of India and secondly, he must possess either of the qualifications mentioned in clauses (b) to (d) above.

(5) Term of Office (Article 124(2)): The Judge of the Supreme Court holds office till he attains the age of 65 years. No minimum age is prescribed for appointment as a Judge of the Supreme Court, nor any fixed period of office. Once appointed, a Judge of the Supreme Court may cease to be so on the happening of (a) attaining the age of 65 years or (b) resigning of his office by writing or (c) being removed by the President.

In ***Madras High Court Advocates' Association v. Dr.A.S.Anand, Hon'ble Chief Justice of India*** **(AIR 2001 SC 970)**– it has been held that no writ lies for determining the age of the Judge.

(6) Salary and Allowances: Article 125 of the Constitution provides that—

"1. There shall be paid to the Judges of the Supreme Court such salaries as may be determined by Parliament by law and, until provision in that behalf is so made, such salaries as are specified in the Second Schedule.

2. Every Judge shall be entitled to such privileges and allowances and to such rights in respect of leave of absence and pension as may from time to time be determined by or under law made by Parliament and, until so determined, to such privileges, allowances and rights as are specified in the Second Schedule.

Provided that neither the privileges nor the allowances of a Judge nor his rights in respect of leave of absence or pension shall be varied to his disadvantage after his appointment". [These matters are governed by the Supreme Court Judges (Salaries and Conditions of Service) Act, 1958].

Regarding provisions as to Judges of Supreme Court, Part D. Part 9(1) to (5) of the Constitution (Sch. II) provides that—

"9(1): There shall be paid to the Judges of the Supreme Court, in respect of time spent on actual service, salary at the following rates per mensem, that is to say:

The Chief Justice Rs.33,000/- (w.e.f. 01-01-1996)*.

Any other Judge Rs.30,000/-**

Provided that if a Judge of the Supreme Court at the time of his appointment is in receipt of a person (other than a disabled or wounded person) in respect of any previous service under the government of India or any of its predecessor Governments or under the Government of a State or any of its predecessor Governments, his salary in respect of service in the Supreme Court shall be reduced–

a) by the amount of that pension, and

b) if he has, before such appointment, received in lieu of a portion of the pension due to him in respect of such previous service

*. Now Rs. 2,80,000/- per mensem vide Act 10 of 2018, w.r.e.f. 1-1-2016.

**. Rs. 2,50,000/- per mensem vide Act 10 of 2018, w.r.e.f. 1-1-2016.

the commuted value thereof, by the amount of that portion of the pension, and

c) if he has, before such appointment, received a retirement gratuity in respect of such previous service, by the pension equivalent of that gratuity.

(2) Every Judge of the Supreme Court shall be entitled without payment of rent to the use of an official residence.

(3) Nothing in sub-paragraph (2) of this paragraph shall apply to a Judge who, immediately before the commencement of this Constitution–

a) was holding office as the Chief Justice of the Federal Court and has become on such commencement the Chief Justice of the Supreme Court under clause (1) of Article 374, or

b) was holding office as any other Judge of the Federal Court and has on such commencement become a Judge; (other than the Chief Justice) of the Supreme Court under the said clause, during the period he holds office as such Chief Justice or other Judge, and every Judge who so becomes the Chief Justice or other Judge of the Supreme Court shall, in respect of time spent on actual service as such Chief Justice or other Judge, as the case may be, be entitled to receive in addition to the salary specified in sub-paragraph (1) of this paragraph as special pay an amount equivalent to the difference between the salary so specified and the salary which he was drawing immediately before such commencement.

(4) Every Judge of the Supreme Court shall receive such reasonable allowances to reimburse him for expenses incurred in travelling on duty within the territory of India and shall be afforded such reasonable facilities in connection with travelling as the President may from time to time prescribe.

(5) The rights in respect of leave of absence (including leave allowances) and pension of the Judges of the Supreme Court shall

be governed by the provisions which, immediately before the commencement of this Constitution, were applicable to the Judges of the Federal Court.

(7) Removal of the Judge of the Supreme Court (Article 124(2)): As per proviso (b) of Article 124(2) of the Constitution, a Judge may be removed from his office in the manner provided in clause (4).

Clause (4) of the Article 124 of the Constitution provides that "A Judge of the Supreme Court shall not be removed from his office except by an order of the President passed after an address by each House of Parliament supported by a majority of the total membership of the House and by a majority of not less than two-thirds of the members of the House present and voting has been presented to the President in the same session for such removal on the ground of proved misbehavior of incapacity".

Clause (5) of the Article 124 of the Constitution provides that Parliament may by law regulate the procedure for the presentation of an address and for the investigation and proof of the misbehavior or incapacity of a Judge under clause (4).

(8) Prohibition of Practice (Article 124(7)): According to Article 124(7) of the Constitution, no person who has held office as a Judge of the Supreme Court shall plead or act in any Court or before any authority within the territory of India. However as per Article 128 of the Constitution a retired Judge may at any time held the office of a Judge when requested by the Chief Justice of India with the consent of the President and he consents so to do.

(9) Appointment of Acting Chief Justice (Article 126): Article 126 of the Constitution provides that when the office of Chief Justice of India is vacant on when the Chief Justice is, by reason of absence or otherwise, unable to perform the duties of his office, the duties of the office shall be performed by such one of the other Judges of the Court as the President may appoint for the purpose.

(10) Ad-hoc Judges (Article 127): Clause (1) of Article 127 provides that if at any time there should not be a quorum of the Judges available to hold or continue any session of the Court, the Chief Justice may, with the previous consent of the President and after consultation with the Chief Justice of the High Court concerned, request in writing, a Judge of a High Court to act as *ad hoc* Judge in the Supreme Court, for such period as may be necessary. The Judge so appointed should be qualified to be appointed as a Judge of the Supreme Court.

While so attending and acting as *ad hoc* Judge, the Judge shall have the jurisdiction, powers and privilege, of a Judge of the Supreme Court. The *ad hoc* Judge shall attend the sitting of the Court in priority to other duties of his office at the time and for the period for which his attendance is required.

(11) Independence of Judiciary: The Constitution of India provides various provisions to ensure the independence of Judiciary headed by the Supreme Court as stated hereunder:

1. **Security of Tenure (Appointment, tenure and removal):** The Judges of the Supreme Court are appointed by the President of India. The Chief Justice also is appointed by the President with the consultation of the other Judges of the Supreme Court and High Courts (if he finds such consultation is necessary). He holds office until he attains the age of 65 years. His term of office is fully secured. The Judge of Supreme Court or High Court cannot be removed/terminated except by impeachment motion with two thirds majority in the Parliament. In March, 1990, such impeachment motion was made against Justice V. Ramaswamy, the then Judge, Supreme Court. But, it was defeated since there was no two third majority in the House. Only 200 members voted in favour of the impeachment motion against him.
2. **Jurisdiction:** The Constitution conferred wide powers on the jurisdiction of the Supreme Court. The Parliament may extend its jurisdiction, but cannot curtail the same.

3. **Salary:** The Judges are duly paid and their salaries and allowances cannot be altered except in a grave financial emergency.
4. **No discussion in the House:** According to Articles 105 and 194 of the Constitution, the members of the House (Parliament or State legislature) are privileged to discuss any matter without the fear of defamation proceedings against them. However, this privilege is subject to the restriction that the conduct of the Judges should not be discussed in the House.
5. **Contempt of Court:** Supreme Court and High Courts are empowered to punish those, who are guilty of the contempt of Court (Articles 129 & 125). This power is very essential for maintaining the independence of judiciary.

   Articles 32 and 226 of the Constitution confer wide powers on the Supreme Court and High Courts respectively for maintaining the independence of judiciary.
6. **Separation of Judiciary from Executive:** Article 50 directs the State to take steps to separate the judiciary from the executive in the public services of the State. It emphasises the need of securing the judiciary from the interference by the executive.

(12) Jurisdiction of the Supreme Court: The Supreme Court of India is the Apex Court of our Country. Its jurisdiction may be explained with reference to the following heads:

1. Original Jurisdiction
   - i) Writ Jurisdiction (Article 32)
   - ii) Exclusive Jurisdiction (Article 131)
2. Appellate Jurisdiction
   - i) Interpretation of the Constitution (Article 132)
   - ii) Civil Matters (Article 133)

iii) Criminal Matters (Article 134)

iv) Special Leave to Appeal (Article 136)

3. Advisory Jurisdiction (Article 143).

1. Original Jurisdiction: The Original Jurisdiction of the Supreme Court may be explained as follows:

i) Enforcement of Fundamental Rights (Article 32); and

ii) Centre-State Disputes (Article 131).

i) Enforcement of Fundamental Rights (Article 32): Article 32 of the Constitution confers original jurisdiction on the Supreme Court to enforce Fundamental Rights. It is empowered to issue direction or orders or different writs viz., writ of habeas corpus, mandamus, prohibition etc. under Article 32. An individual can directly approach the Supreme Court.

Article 32 confers wide (enormous) power on the Supreme Court. Article 32 empowers Supreme Court to relax the traditional rule of *Locus Standi* and allows public interest litigations at the instance of public spirited citizens.

Under Article 32, the Supreme Court can provide relief to bonded labour, undertrial prisoners (*Sunil Batra Case).* Victims of police torture (*Saheli, A Women's Resource Centre v. Commissioner of Police, Delhi)* etc.

ii) Centre-State Disputes (Article 131): Being the Chief appellate tribunal, it has original jurisdiction to settle the disputes.

a) between the Centre (Union of India) and one or more States;

b) between Centre and State/States on one side and one or more States on the other side, and

c) between two or more States.

2. Appellate Jurisdiction: It may be explained as follows:

i) **Interpretation of the Constitution (Article 132):** Article 132(1) empowers the Supreme Court to interpret any matter involving the question of law as referred to it by High Court under Article 134-A.

ii) **Civil Matters (Article 133):** Article 133 confers jurisdiction on the Supreme Court to hear appeal from any judgment by the High Court in civil matters. It must be certified by the High Court under Article 134-A.

iii) **Criminal Matters (Article 134):** According to Article 134(a)(b), an appeal may lie before the Supreme Court from any sentence by High Court without the certificate of the High Court.

According to Article 134(c) an appeal lies before the Supreme Court, if the High Court certifies under Article 134-A.

iv) **Special Leave to Appeal (Article 136):** Article 136 of the Indian Constitution empowers the Supreme Court to grant Special Leave to appeal from any judgment, decree, determination, sentence or order in any matter passed by any Court or tribunal. The Supreme Court can exercise discretionary power in this connection.

Grounds for granting Special Leave: The remedy under Article 136 is extra-ordinary and discretionary, and hence, is granted in exceptional cases on the following grounds. If the tribunal–

1. has acted in excess of the jurisdiction;
2. failed to exercise its apparent jurisdiction;
3. committed an error of law apparent on the face of the record;
4. acted illegally;
5. violated the principles of natural justice;
6. the decision involved an important question of law.

In view of the increasing number of appeals under Article 136, the Supreme Court suggested the Government (Janata Government) to curtail its jurisdiction under Article 136. But the proposal could not be materialised since the lawyers opposed it.

3. Advisory Jurisdiction (Article 143): Article 143 of the Constitution speaks about the advisory jurisdiction of the Supreme Court. The President of India refers to the Supreme Court, for its opinion, any matter, which involves any question of fact or law having public importance. Then, the Supreme Court gives its advisory opinion. The President may or may not follow the same since it is not mandatory.

CASE COMMENT

Q. Discuss the facts and law laid down in the case of *Rama Jawaya Kapoor v. State of Punjab*, AIR 1955 SC 549.

Answer:

This case is popularly known as Book Sellers' Case. It refers to Articles 53(1) and 74 of Indian Constitution, which deal with the Executive Power of the Union.

There are three organs of the Government, namely, the Executive, the Legislature and the Judiciary. Articles 52 to 78 and 123 lay down the provisions relating to the Union Executive. The Union Executive consists of the President; Vice-President; the Council of Ministers headed by the Prime Minister and the Attorney General of India.

Facts of the Case: The Government of Punjab issued an executive order, nationalising the text books prescribed for study in the recognised Schools in the State. The Government acquired the copyrights from the authors and had undertaken to print and sell the books. The petitioners challenged the order, contending that the executive power of the State would not extend to trade activities without a legislative sanction. The petitioners contended that the

executive power of the Union does not extend to a matter in the concurrent list unless:

1. expressly provided in the Constitution e.g., Articles 256, 257, 258, 353 and 356; or
2. expressly entrusted by a law made by Parliament, Clause (2) of Article 73 is an exception to the rule laid down in Clause (1). This clause provides that until otherwise provided by Parliament, a State may continue to exercise executive power on matters (now included in the Union or Concurrent List) which it was authorised to exercise before the commencement of the Constitution. It should not, however, encroach upon any legal or fundamental rights of citizens.

The State on the other hand argued that, the executive power was not confined to matters on which legislation had already been passed. If the executive formulates a policy to start a trade or business it is not always necessary to have legislative sanction. If a trade or business requires expenditure or funds legislative authorisation is necessary. In this case the provisions for funds in the appropriation Act was already made and hence there was no need of a specific legislation for carrying on the trade or business.

Questions Involved: The question involved in the instant case was, whether the State could carry on a trade or business activity even without a legislative sanction. Answering in affirmative, the court admitted the contention of the State.

Judgment/Decision: The Supreme Court held that the State, in exercise of its executive power, could carry on trade or business activity even without a legislative sanction and dismissed the petition against the State.

Principles: The principles applied in the instant case are:

1. The executive power is vested in the President under Article 53(1). However, Article 74 envisages that the President

shall act in accordance with the aid and advice of the Council of Ministers headed by the Prime Minister.

2. Ordinarily, the executive power connotes the residue of Governmental functions that remain after legislative and judicial functions are taken away.

QUESTIONS AND HOW TO ANSWER
(Lectures V-VII)

I) Short Questions

Q. State the fundamental duties of a citizen of India. (A.U., Model Q.P., Part-A, Q.6, Marks: 4).

Ans.: Write about the fundamental duties in brief.

Q. Explain the Advisory Jurisdiction of the Supreme Court of India. (N.U., April 1999, Part-A, Q.6, Marks: 4).

Ans.: Write about it from Jurisdiction of the Supreme Court.

Q. Explain the procedure for impeachment of the President. (S.V.U., Nov. 1999, Part-A, Q.3, Marks: 4).

Ans.: Write in brief the removal/impeachment from the topic President of India.

Q. Explain original jurisdiction of the Supreme Court. (S.V.U., Nov. 1999, Part-A, Q.5, Marks: 4).

Ans.: Write about it in brief from the topic Jurisdiction of the Supreme Court.

Q. Examine the Pardoning power of the President. (A.U., Nov. 2000, Part-A, Q.4, Marks: 4).

Ans.: Write about it in brief from the topic 'Powers of the President'.

Q. What are the qualifications for the President of India? (A.U., July 2001, Part-A, Q.2, Marks: 4).

Ans.: Write about it from the topic, President of India.

II) Essay Questions

Q. Discuss the relationship between Fundamental Rights and Directive Principles of State Policy. (A.U., Model Q.P., Part-B, Q.1, and N.U. April 1999, Part-B, Q.11 and A.U., July 2001, Part-B, Q.1, Marks: 18).

Ans.: Write about the Fundamental Rights and Directive Principles in brief and then write the relationship/distinction between the two.

Lecture - III

The State Executive (Articles 153-167 & 213) (The Governor)

Chapter II of Part VI of the Constitution containing Articles 153 to 167 and 213 deal with the State Executive. It provides for various provisions relating to the Governor, the State Council of Ministers and the Advocate General of the State, and the conduct of Government business. Article 153 deals with Governors of the State. Article 124 deals with the Executive Power of the State. Articles 163 and 164 lay down the provisions relating to the Council of Ministers. Article 165 empowers the Governor to appoint Advocate General of the State. Articles 166 and 167 lay down the provisions with regard to conduct of Government business. Finally Article 213 (Chapter IV) empowers the Governor of the State to promulgate ordinances during recess of legislature. This lecture covers the following heads—

1. The Governor
   - i) Qualifications (Article 157).
   - ii) Term of Office.
   - iii) Powers of Governor
     - a) Executive Powers (Article 154(1).
     - b) Financial Powers (Articles 202 & 203(3).
     - c) Legislative Powers (Article 168(1).
     - d) Ordinance Making Power (Article 213).
     - e) Judicial Powers and
     - f) Power to grant pardons (Article 161).

THE GOVERNOR

Article 153 of the Constitution makes provision for appointment of Governors for the States. Article 153 provides that, "there shall be a Governor for each State. However, one person may be appointed as a Governor of two or more States. He is the Constitutional or nominal head of the Executive and is bound by the advice of the Ministers. As per Article 152, the expression 'State' does not include the State of Jammu and Kashmir. However, the State of Jammu and Kashmir is as much a State within India as any other State but exception in Article 152 is limited to Part VI (The State).

According to Article 155 of the Constitution, the Governor of a State shall be appointed by the President of India by warrant under his hand and seal. He is a nominee of the Central Government. The Governor is appointed with the advice tendered by the Central Cabinet to him as provided under Article 74 of the Constitution.

(i) Qualifications (Article 157): Article 157 provides that a person to be eligible for appointment of Governor—

1. must be a citizen of India; and
2. must have completed the age of 35 years.

(ii) Term of Office (Article 156): Article 156(1) provides that the Governor holds office during the pleasure of the President. He may be writing under his hand addressed to the President, resign his Office. Subject to the above provisions, a Governor holds office for a term of five years from the date on which he enters upon his office. Article 156 reads as follows–

1. The Governor shall hold office during the pleasure of the President.
2. The Governor may, by writing under his hand addressed to the President, resign his office.

3. Subject to the foregoing provisions of this article, a Governor shall hold office for a term of five years from the date on which he enters upon his office:

Provided that a Governor shall, notwithstanding the expiration of his term, continue to hold office until his successor enters upon his office.

(iii) Powers of the Governor: The constitutional position of the Governor of a State is similar to that of the President of India with regard to his/her State concerned of the State. The real executive power of the State is vested in the State Council of Ministers. The powers of the Governor may be explained with reference to the following heads:

a) Executive Powers (Article 154(1)).

b) Financial Powers (Articles 202 & 203(3)).

c) Legislative Powers (Article 168(1)).

d) Ordinance Making Power (Article 213); and

e) Power to grant pardons (Article 161).

(a) Executive Powers (Article 154(1)): Article 159 of the Constitution confers on Governor, the executive powers of the State. It runs as follows–

1. The executive power of State shall be vested in the Governor and shall be exercised by him either directly or through officers subordinate to him in accordance with this Constitution.

2. Nothing in this Article shall–

   a) Be deemed to transfer to the Governor any functions conferred by any existing law on any other authority; or

   b) Prevent Parliament or the Legislature of the State from conferring by law functions on any authority subordinate to the Governor.

The executive power of the State is vested in the Governor. All executive actions of the Government of a State shall be expressed to be taken in the name of the Governor directly or through the officers subordinate to him i.e. the Ministers and heads of various Departments of the State viz. Law and Order, Finance, Irrigation, Commercial Taxes, Education etc. Orders and instruments, made and executed in the name of the Governor, shall be authenticated in the manner specified in the rules made by the Governor. The validity of an order of instrument, which is so authenticated shall not be called in question on the ground that it was not made or executed by the Governor (Article 166(1) and (2)). The provisions of Article 166(1) and (2) are, however, directory and not mandatory.

The Governor appoints various officials E.g: Attorney General for the State (Article 165), Chairman and other Members of the State Public Service Commission (Article 316), and distribute Judges and other Judges of the subordinate Courts in the State in consultation with the State High Court.

The Ministers as well as Advocate General hold office during the pleasure of the Governor, but the Members of the State Public Service Commission cannot be removed by him, they can be removed only by the President on the report of the Supreme Court on reference made by the President and, in some cases, on the happening of certain disqualifications (Article 317).

Under Article 166(3) the Governor is authorised to make rules for the more convenient transaction of the business of the Government of the State and for its allocation among Ministers.

In **Sunil Kumar v. Government of West Bengal** (***AIR 1950 Cal. 274)***– the Calcutta High Court observed "The Governor under the present Constitution cannot act except in accordance with the advice of his Ministers".

In ***Ram Jawaya v. State of Punjab, AIR 1955 SC 549***– The Supreme Court held that the President and Governors are the

Constitutional heads and the real executive powers are vested in the Council of Ministers. The President and Governors are required to exercise their powers on the advice of the Council of Ministers.

Similar view was laid down by the Supreme Court in ***Samsher Singh v. State of Punjab*** **(AIR 1974 SC 2193)**– the Supreme Court has held that wherever Constitution requires the satisfaction of the Governor, the 'satisfaction' is the satisfaction of the Council of Ministers and not the personal satisfaction of the Governor. He is merely a constitutional head.

(b) Financial Powers (Articles 202 & 203(3)): A money Bill cannot be introduced in the Legislative Assembly of the State without the recommendation of the Governor. No demand of grants can be made except on the recommendation of the Governor. The Governor is required to cause to be laid before the House of the Legislature annual financial Statements, known as Budget (Article 202). A Bill, which, if enacted and brought into operation, would involve expenditure from the Consolidated Fund of a State, cannot be passed by a House of the State Legislature, unless the Governor has recommended to the House the consideration of the Bill (Article 207(3)).

The Governor has the contingency fund of the State at his disposal for emergencies.

Subject to limits, if any, fixed by the legislature, the Governor can borrow money on the security of the Consolidated Fund of the State and guarantee the loans of any other local authorities.

(c) Legislative Powers (Article 168(1)): Article 168 of the Constitution confers on the Governor of a State, the legislative or law making power (under delegated legislation by the Parliament, the supreme legislature/law making body). It reads as follows—

1. For every State there shall be a Legislature which shall consist of the Governor, and

a) In the States of Andhra Pradesh, Bihar, Maharashtra, Karnataka, Tamil Nadu, Telangana and Uttar Pradesh, two houses:

b) In other States, one House.

2. Where there are two Houses of the Legislature of a State, one shall be known as the Legislative Council and the other as the Legislative Assembly, and where there is only one House, it shall be known as the Legislative Assembly.

The Governor is part and parcel of the Legislature of a State which consists of the Governor and the House or Houses of Legislature as the case may be (Article 168).

The Governor nominates one-sixth of the total number of the members of the Legislative Council (Upper House) where such Council exists from amongst the persons having special knowledge or practical experience in respect of such matters as literature, science, Arts, cooperative movement and social service (Article 71).

The Governor of a State may, if he is of opinion that the Anglo-Indian Community needs representation in the Legislative Assembly of the State and is not adequately represented therein, nominate one member of that community to the Assembly (Article 333).

The Governor summons the Houses or each House of the Legislature of State to meet at such time and place as he thinks fit. However, six months must not lapse between the last sitting in one session and the first in the next session. He may prorogue the Houses or either House and dissolve the Legislative Assembly (Article 174(1) and (2)). He has right to address the State Legislature. No Bill can become law without the assent of the President. He has right to reserve certain Bills for the assent of the President (Article 200).

The most important Legislative power of the Governor is his Ordinance making power. Under Article 213, whenever the

Legislature is not in session and if the Governor is satisfied that circumstance exist which require him to take immediate action he may legislate by Ordinances.

The Governor possesses power of causing to be laid before the State Legislature the annual financial statement (Article 202) and of making demands for grants and recommending 'Money Bills' (Article 207).

(d) Ordinance Making Power (Article 213): Article 213 of the Constitution confers on Governor, ordinance making power during the recession of the legislature. It reads as follows–

1. If at any time, except when the Legislative Assembly of a State is in session, or where there is a Legislative Council in a State, except when both Houses of the Legislature are in session, the Governor is satisfied that circumstances exist which render it necessary for him to take immediate action, he may promulgate such Ordinance as the circumstances appear to him to required:

   Provided that the Governor shall not, without instructions from the President, promulgate any such Ordinance if:

   a) A Bill containing the same provisions would under this Constitution have required the previous sanction of the President for the introduction thereof into the Legislature, or

   b) He would have deemed it necessary to reserve a Bill containing the same provisions for the consideration of the President, or

   c) An Act of the Legislature of the State containing the same provisions would under this Constitution have been invalid unless, having been reserved for the consideration of the President; it had received the assent of the President.

2. An Ordinance promulgated under this Article shall have the same force and effect as an Act of the Legislature of the State assented to by the Governor, but every such Ordinance—

   a) Shall be laid before the Legislative Assembly of the State, or where there is a Legislative Council in the State, before both the Houses, and shall cease to operate at the experience of six weeks from the reassembly of the Legislature, or if before the expiration of that period a resolution disapproving it is passed by the Legislative Assembly and agreed to by the Legislative Council, if any, upon the passing of the resolution or, as the case may be on the resolution being agreed to by the Council, and

   b) May be withdrawn at any time by the Governor.

   Explanation:- Where the Houses of the Legislature of a State having a Legislative Council are summoned to reassemble on different dates, the period of six weeks shall be reckoned from the latter of those dates for the purposes of this clause.

3. If and so far as an Ordinance under this Article makes any provision which would not be valid if enacted in an Act of the Legislature of the State assented to by the Governor, it shall be void:

   Provided that, for the purposes of the provisions of this Constitution relating to the effect of an Act of the Legislature of a State which is repugnant to an Act of Parliament or an existing law with respect to a matter enumerated in the Concurrent List, an Ordinance promulgated under this Article in pursuance of instructions from the President shall be deemed to be an Act of the Legislature of the State which has been reserved for the consideration of the President and assented to by him.

The most important power of the Governor is the Ordinance making power. The Governor under Article 213 is empowered

to promulgate an ordinance if the following two conditions are satisfied:

1. When the Legislative Assembly of State is not in Session or where there are two Houses in the Legislature, when both Houses are not in Session.
2. The Governor must be satisfied that circumstances exist which render it necessary for him to take immediate action.

An Ordinance promulgated under this Article shall have the same force and effect as an Act of the Legislature of the State.

The Ordinance shall be laid before the Legislative Assembly or where there is a Legislative Council in the State, before both Houses and, shall cease to operate at the expiration of six weeks from the reassembly of the Legislature. The Ordinance may be withdrawn at any time by the Governor.

The Governor cannot issue an ordinance without the instructions from the President under the following cases:

a) If a Bill containing the same provisions would have required the previous sanction of the President for its introduction into the Legislature.

b) If he would have deemed it necessary to reserve a Bill containing the same provisions would have been invalid unless having been reserved for the consideration of the President.

c) If an Act of the legislature of the State containing the same provisions would have been invalid unless having been reserved for the consideration of the President it had received the assent of the President.

D.C. Wadhwa v. State of Bihar, (1987) 1 SCC 378– The petitioner in the instant case, challenged the practice of the State of Bihar in promulgating and re-promulgating ordinances on a large scale without enacting them into Acts of the legislature and keeping them alive for an indefinite period of time. He pointed out that the

Governor of Bihar had promulgated 256 ordinances between 1967 and 1981 and all these were kept alive for periods ranging from 1 to 14 years by repromulgating them from time to time. Out of these 256, 69 were repromulgated several times and kept alive with the prior permission of the President of India. The five-Judge Bench of the Court held that such a practice was a "subversion of the democratic process" and "colourable exercise of power and amounted to fraud upon the Constitution and, therefore, unconstitutional."

(e) Judicial Powers: The Governor appoints the District Judges and other Judges of the subordinate Courts in the State. The Governor is consulted by the President in the appointment of the Chief Justice and the Judges of the High Court.

(f) Power to grant Pardons (Article 161): The term 'Pardon' is an act of grace, which cannot be claimed/demanded as a matter of right. Article 161 of the Constitution confers on Governor, the power to grant pardons, reprieves, respites or remissions of punishment or to suspend, remit or commute the sentence of any person convicted of any offence against any law relating to matters to which the executive power of the State extends.

It is to be noted that the pardoning power of the Governor of the State is subject to judicial review.

A similar power is conferred by Article 72 on the President of India. But there is a difference between the pardoning power of the President under Article 72 and the pardoning power of the Governor of a State under Article 161. Under Article 72 the President's power is wider than that of the Governors of States: firstly the President has exclusive power to grant pardon in cases where the sentence is a death sentence while the Governor cannot grant pardon in case of a death sentence. Secondly, the President can pardon punishments of sentences inflicted by Court Martial. The Governors have no such power. In respect of suspension,

remission and commutation of sentence of death both have concurrent power.

Case Law:- In ***K.M.Nanawati v. State of Bombay*** **(AIR 1961 SC 99)–** the Supreme Court has held that the power of the Governor to suspend sentence under Article 161 is subject to the rules made by the Supreme Court with respect to only those cases which are pending before it in appeal. It is open to the Governor to grant a full pardon at any time even during the pendency of the case in the Supreme Court, but the Governor cannot exercise his power of suspension of the sentence for the period when the Supreme Court is seized of the case.

In ***Swaran Singh v. State of U.P.*** **(AIR 1998 SC 2026)–** it has been observed that if the order is passed by the Governor under Article 161 without being appraised of material facts, the order would be arbitrary and the Court is not precluded from judicially reviewing such other. If the power of the Governor under Article 161 is exercised arbitrarily, *mala fide* or in absolute disregard of the finer cannons of the constitutionalism, the byproduct order cannot get the approval of law and in such cases the judicial hand must be stretched to it.

In ***Epuran Sudhakar v. State of A.P*** (The Times of India, 5 October, 2006)– it has been held that the Governor cannot exercise his pardoning power arbitrarily. The Court further observed that if the exercising of pardoning power is done on the ground of caste, religion or political considerations the Court can examine its constitutional validity.

In ***Satpal v. State of Haryana*** **(AIR 2000 SC 1702)–** it has been observed that the power of granting pardon under Article 161 is very wide and do not contain any limitation as to the time on which and the occasion on which and the circumstances in which the said power could be exercised. But the said power being a constitutional power is amenable to judicial review on certain limited grounds. The Court, therefore, would be justified

in interfering with an order passed by the Governor in exercise of power under Article 161 of the Constitution. If the Governor is found to have exercised the power himself without being advised by the Government or if the Governor transgresses the jurisdiction in exercising the same or it is established that the Governor has passed the order without application of mind or the order in question is a *mala fide* one or the Governor has passed the order on some extraneous consideration.

Lecture - IV

Privileges of the Legislature or Parliamentary Privileges or Privileges and Immunities of the Members of the Parliament and State Legislatures (Articles 105 & 194)

In India, the Parliamentary Privileges are not codified. However, Articles 105 and 194 of the Indian Constitution confer certain privileges on the members of the Parliament and State Legislatures respectively, which read as follows:

Powers, Privileges, etc. of the Houses of Parliament and of the members and committees thereof (Article 105): (1) Subject to the provisions of this Constitution and to the rules and standing orders regulating the procedure of Parliament, there shall be freedom of speech in Parliament.

(2) No member of Parliament shall be liable to any proceedings in any court in respect of anything said or any vote given by him in Parliament or any committee thereof, and no person shall be so liable in respect of the publication by or under the authority of either House of Parliament of any report, paper, votes or proceedings.

(3) In other respects, the powers, privileges and immunities of each House of Parliament, and of the members and the committees of each House, shall be such as may from time to time be defined by Parliament by law, and, until so defined, (shall be those of that House and of its members and committees immediately before the coming into force of Section 15 of the Constitution (Forty-fourth Amendment) Act, 1978).

(4) The provisions of clauses (1), (2) and (3) shall apply in relation to persons who by virtue of this Constitution have the right to speak in, and otherwise to take part in the proceedings of, a

House of Parliament or any committee thereof as they apply in relation to members of Parliament.

Powers, Privileges, etc. of the House of Legislatures and of the members and committees thereof (Article 194): (1) Subject to the provisions of the Constitution and to the rules and standing orders regulating the procedure of the Legislature, there shall be freedom of speech in the Legislature of every State.

(2) No member of the Legislature of a State shall be liable to any proceedings in any court in respect of anything said or any vote given by him in the Legislature or any committee thereof, and no person shall be so liable in respect of the publication by or under the authority of a House of such a Legislature of any report, paper, votes or proceedings.

(3) In other respects, the powers, privileges and immunities of a House of the Legislature of a State, and of the members and the committees of a House of such Legislature, shall be such as may from time to time be defined by the Legislature by law, and, until so defined (shall be those of that House and of its members and committees immediately before the coming into force of section 26 of the Constitution (Forty-fourth Amendment) Act, 1978).

(4) The provisions of clauses (1), (2) and (3) shall apply in relation to persons who by virtue of this Constitution have the right to speak in, and otherwise to take part in the proceedings of a House of, the Legislature of a State or any committee thereof as they apply in relation to members of that Legislature.

Meaning: The word 'Privilege' literally means "a special right conferred or a special/separate treatment extended/given by virtue of sex, age, caste, position etc. E.g: reservation for women, scheduled castes, tribes, minorities and special treatment/honor extended to the persons of high social status, viz. Politicians, Judges, and Higher Officials of the Government etc. E.g: Sovereign Immunity i.e. the State/Government is exempted from liability for the wrongs committed by its (public/civil) servants on the ground that they committed the wrongs in discharge of sovereign functions. An indigent person

(pauper) is exempted from court fee for filing a suit, appeal etc. The President of India, the Governors of States, Ambassadors, Diplomatic envoys etc. are exempted from the liability, civil and criminal. In other words, the word 'immunity' means "freedom from liability." It is a kind of privilege. Privilege is an exceptional right or an exemption conferred on a person by virtue of his office.

In simple words, the word 'privilege' means "special right" and 'immunity' means "to exempt from liability as a special case."

Privilege, as used in its broad and commonly accepted sense, is a peculiar advantage; a personal benefit or favour; a personal or private favour enjoyed. Privilege is some peculiar right or favour granted by law contrary to the general rule.

Definition: Sir T.F. May (in his Parliamentary Practice Ch.II, P.42, 16th Ed.) defined "Parliamentary Privileges" as "some of the peculiar rights enjoyed by each House, collectively as a constituent part of the Parliament and by the members of each House individually, without which they could not discharge their functions and which exceed those possessed by other bodies or individuals." The privilege of each House may be divided into two groups: (i) of members individually, and (ii) each House of Parliament, as collectively.

The privileges and immunities of Parliament and its members may be explained with reference to the following heads:

1. Privilege as to Freedom of Speech;
2. Privilege as to Publication;
3. Privilege as to Freedom from Arrest;
4. Privilege as to Privacy of Debates;
5. Privilege to regulate Internal Proceedings;
6. Privilege to prohibit the publication of its reports;
7. Privilege to hold inquiries and summon witnesses; and
8. Privilege to punish members or outsiders and breach of privileges and contempt of the House.

1. Privilege as to Freedom of Speech: The fundamental principle of parliamentary democracy is a free, frank and fearless discussion in Parliament and State Legislatures. What- ever is said/ spoken or whatever statements are made during sessions by the members of the Central and State Legislatures causing injury or damage to the character or reputation of other/others is not subject to any defamation suit. As such, the members enjoy the privilege of speaking anything. In England, Bill of Rights 1689 confers on the House of Commons, privilege as to freedom of speech or debates in Parliament. Similar provision as to freedom of speech and expression or debates is enshrined in Articles 105 and 194 of the Constitution. However, this privilege is available to the members within the four walls of the House and is also subject to other provisions of the Constitution. For instance, the conduct of the Judge of the Supreme Court or High Court cannot be discussed in the House, except on an impeachment motion against such Judge. (In 1990, impeachment motion against Justice V. Ramaswamy, the then Judge, Supreme Court was moved in the Parliament.) Further, the freedom of speech guaranteed under Articles 105 and 194 is different from the freedom of speech guaranteed under Article 19(1)(a). The former (Articles 105 and 194) is not subject to reasonable restrictions, while the latter Article 19(1)(a) is subject to reasonable restrictions under Article 19(2).

In ***T.K.Jain v. State*** **(AIR 1970 SC 1573)** - it has been observed that in the expression 'anything said in Parliament' 'anything' means 'everything' and 'in Parliament' means during the sitting of the Parliament and in course of the business of the Parliament.

2. Privilege as to Publication: According to Clause 2 of Articles 105 and 194, no person shall be held liable in any court for publication of any report or proceedings under the authority of a House. To ensure freedom of press, Article 361-A was inserted under 44th Amendment to the Constitution. Article 361-A provides that no person shall be liable to any civil or criminal proceedings for publication in newspaper, any true report of the proceedings of the either House of the Parliament or State Legislature, unless

it is made with malice. The object of the protection under Articles 105(2) and 194(2) is to enable members to speak their mind in Parliament freely and fearlessly.

In ***Dr. Satish Chandra Ghosh v. Hari Sadan Mukherjee*** **(AIR 1961 SC 613)**– it has been held that outside the House a member of House is as good as any other citizen and if he repeats or publishes a defamatory speech made by him within the House, he does so on his own responsibility and risk and will be liable for prosecution under Section 500 of the I.P.C.

In *P.V. Narasimha Rao v. State* (CBI/SPF) a Five-Judge Bench of the Supreme Court by 3:2 majority held that the scope of protection of immunity available to the Members of Parliament is quite wide and is not confined only to judicial proceedings but is available to them against all civil action and criminal proceedings for any thing said or any vote given by them in the House of Parliament. The Court held that the MPs who had taken bribe and voted in Parliament against no confidence motion brought against the Narasimha Rao Government are entitled to the protection of Article 105(2) and are not answerable in a court of law for alleged conspiracy and agreement. But the MPs who had given bribe but not voted on the no-confidence motion are not entitled to the protection.

3. Privilege as to Freedom from Arrest: A member of a Parliament cannot be arrested or imprisoned on a civil proceeding within a period of 40 days before or 40 days after the session or during the session of the Parliament. (Section 135 of the Code of Civil Procedure, 1908 as amended by the Act of 104 of 1976). However, this privilege is not available to him against criminal charge or for contempt of court or to preventive detention. Such arrest must be informed to the officer of the House (Speaker, in case of Lok Sabha and State Legislative Assembly and Chairman in case of Rajya Sabha or Legislative Council).

In ***K.Anandan v. Chief Secretary, Government of Madras*** **(AIR 1966 SC 657)** - it has been held that members of Legislature

do not enjoy any special status are compared to ordinary citizens in respect of valid orders of detention. The privilege of freedom from arrest is also not available in cases of detentions under the Preventive Detention Act.

4. Privilege as to Privacy of Debates: In England and India, Parliament in exceptional cases, holds secret sessions to discuss certain important matters.

5. Privilege to regulate Internal Proceedings: The House has an exclusive right to regulate its internal proceedings. The courts will not interfere with the internal proceedings of the House.

In *Bradlaugh v. Gossett,* (1824) 12 Q.B.D. 271– Bradlaugh was prevented from entering the House of Commons by the order of the House. The validity of the order was upheld by the Court.

6. Privilege to prohibit the Publication of its Reports: Both in England and India, the House has a right to prohibit the publication of its reports or proceedings or debates or other proceedings.

7. Privilege to hold inquiries and summon witnesses: The House of Commons in England has the power to hold inquiries, summon the records and witnesses. The witnesses also enjoy such privilege. The position is the same in India also.

8. Privilege to punish Members or outsiders for Breach of Privileges and Contempt of the House: Both in England and in India, the House is empowered to punish its members and outsiders for the breach of privileges or contempt of the House. This privilege is described as the "Keystone of Parliamentary Privilege." There are many instances, where the members were expelled from the House for breach of privilege or contempt of the House. For instance, Mrs. Indira Gandhi was expelled from the House for breach of Parliamentary Privilege.

Legislative Privilege v. Judiciary **(Conflict between the Legislature and Judiciary)**– The crucial question is, where there is a conflict between the legislative privilege and the judiciary, which

will prevail over the other. This question came for discussion in the following cases:

(1) ***Kesava Singh's Case (In re under Article 143)*** **AIR 1965 SC 745–** In the instant case Kesava Singh, who was not a member of the U.P. Assembly was held guilty of contempt of the House and sentenced to imprisonment for 7 days. He moved a petition for the writ of *habeas corpus.* The two Judge Bench of Allahabad High Court granted an interim bail and he was released. Then, the Assembly passed a resolution that the two Judges, Kesava Singh and his advocate had committed the contempt of the House and they were directed to be brought before the House. Then, the Judges filed a petition under Article 226 in High Court contending that the resolution of the House amounted to contempt of Court. The Full Bench of the Supreme Court passed an order directing the stay of the implementation of the resolution of the Assembly. The arrest warrant against the Judges was withdrawn and they were directed to appear before the House. At this stage, the President of India referred this matter to the Supreme Court for its advisory opinion under Article 143 of the Constitution.

The main questions involved in this case are:

1. Whether the Legislature is the sole and exclusive Judge of the privileges and is competent to punish a person for contempt of the House; and
2. Whether the act of High Court, in moving the petition in Supreme Court for the writ of *Habeas Corpus* would amount to contempt of the Legislature?

The Supreme Court by a majority of 6 to 1 held that the two Judges were not guilty of committing the contempt of the House.

The Supreme Court, while answering/deciding the first question made a distinction between the Parliamentary Privileges in England and Parliamentary Privileges in India. The former

(British Parliament) is sovereign, while the latter (Parliament in India) is subject to, the provisions of the Constitution. Therefore, the privileges of the House in India are subject to judicial review and hence, the U.P. Assembly had no power to arrest the Judges of the High Court.

(2) ***Eenadu Privilege Case* (1984)**– A conflict between the legislature and judiciary arose once again. The Chief Editor of a Telugu Daily, Mr. Ramoji Rao, published in his paper a feature entitled Peddala Galata (Elders' Commotion) regarding the members of the then A.P. Legislative Council. The House ordered him to appear before it. He moved the Supreme Court, which issued an order to the Secretary of the House not to arrest him. Despite Supreme Court's stay order, the House resolved to arrest him and to order him to appear in the House for admonition. At this stage of serious conflict between the House and the Court, at the request of the Chief Minister, the President of India referred this matter to Supreme Court for its advisory opinion and the matter was postponed.

Similar dispute arose again in *Borababu Singh's case*– In this case, the Supreme Court issued an order to arrest Borababu, Speaker of Manipur Assembly for contempt of Court. The Court interpreted the limitations on Parliamentary Privileges in India.

The protection under Article 194(2) does not extend to publication made by a private person without the authority of a House.

In ***Surendra v. Nebra Krishna* (AIR 1958 Orissa 163)**– an editor of a newspaper was held guilty of committing contempt of court for publishing a statement made in the House, amounting to the contempt of High Court without the authority of the House.

Lecture - V

Relations between Union and States (Centre-State Relations) Part-XI & XII Articles 245-293

Part XI containing Articles 245 to 263 (including 257.A inserted by the Constitution (Forty-second Amendment) Act, 1976 and repealed by the Constitution (Forty-fourth Amendment) Act, 1978, Section 33, w.e.f. 20-06-1999) and Article 258.A (inserted by the Constitution (Seventh Amendment) Act, 1956, Section 18, w.e.f. 01-11-1956) divided into two Chapters and Part XII containing Articles 264 to 300.A (including 268.A (inserted by the Constitution (Eighty-eight Amendment) Act, 2003, Section 2), 290.A (inserted by the Constitution (Seventh Amendment) Act, 1956, Section 19, w.e.f. 01-11-1956) and 300.A of Chapter IV (inserted by the Constitution (Forty-fourth Amendment) Act, 1978, Section 34, w.e.f. 20-06-1979). Part XI containing Articles 245 to 255 under Chapter I lays down the provisions relating to Legislative relations. Chapter II of the Part XI containing Articles 256 to 263 lays down the provisions relating to Administrative Relations between the Union and States. Further, Part XII containing Articles 264 to 300.A divided into four chapters lays down various provisions relating to Finance, Property, Contracts and Suits. The financial relations between the Union and States are enshrined in Chapters I and II containing Articles 264 to 293.

The Chief characteristic features of Federation is, the distribution of powers between the Centre and States. In other words, the basic principle of federation is that the legislative, executive and financial authority is divided between the Centre and the States. Therefore, the Centre-State Relations for the

purpose of study may be explained with reference to the following heads.

1. Legislative Relations (Articles 245-255).
   i) The Doctrine of Pith and Substance.
   ii) The Doctrine of Colourable Legislation.
2. Administrative Relations (Articles 256-263); and
3. Financial Relations (Articles 264-293).

1. LEGISLATIVE RELATIONS (ARTICLES 245-255)

Articles 245 to 255 of the Constitution deal with legislative relations between the Centre and States with respect to:

1. Territorial Jurisdiction, and
2. Subject matter of legislation.

1. With respect to Territorial Jurisdiction: The Union Parliament is empowered to make laws for the whole or any part of the territory of India (Article 245(1)). Similarly, the State Legislatures are empowered to make laws for the whole or any part of the State (Article 245(1)). Such law cannot be declared invalid on the ground that it has extra-territorial operation (Article 245(2)).

A state legislature cannot enlarge its jurisdiction, unless its boundaries are widened/expanded by an Act of the Parliament. Parliament has, on the other hand, the power to legislate for 'the whole or any part of the territory of India' which includes not only the States but also the Union territories or any other area, for the time being, included in the territory of India. Parliament also possesses the power of 'extra-territorial legislation (Article 245(2)), which no State Legislature possesses. This means that laws made by Parliament will govern not only persons and property within the territory of India but also Indian subjects resident and their property situated anywhere in the world.

To determine the question whether a particular legislation is within the territorial limits or not, is decided by applying the 'Theory/ Doctrine of Territorial Nexus.' A State law having extra-territorial operation is said to be valid provided there is a sufficient nexus between the object and the State.

2. With respect to Subject Matter of Legislation: Regarding subject-matter made by Parliament and by the Legislatures of States. Article 246 of the Constitution provides that–

1. Notwithstanding anything in clauses (2) and (3) Parliament has exclusive power to make laws with respect to any of the matters enumerated in List I in the Seventh Schedule (in this constitution referred to as the "Union List").
2. Notwithstanding anything in clause (3), Parliament and, subject to clause (1), the Legislature of any State also, have power to make laws with respect to any of the matters enumerated in List III in the Seventh Schedule (in this Constitution referred to as the "Concurrent List").
3. Subject to clauses (1) and (2), the Legislature of any State has exclusive power to make laws for such State or any part thereof with respect to any of the matters enumerated in List II in the Seventh Schedule (in this Constitution referred to as the "State List").
4. Parliament has power to make laws with respect to any matter for any part of the territory of India not included in a State notwithstanding that such matter is a matter enumerated in the State List."

Article 246A of the Constitution provides for special provision with respect to goods and service tax.

The distribution of powers between the Union and the States is contained in three lists viz., the Union List, the State List and the Concurrent List under Seventh Schedule of the Constitution. The Union List consists of 97 subjects; the State List consists of 66 subjects and the Concurrent List consists of 47 subjects as detailed below–

List I or the Union List: It consists of 97 subjects. But entry 33 was deleted by the Constitution (7th Amendment) Act, 1956 and entries 2-A, 92-A, 92-B and 92-C were added by various amendments. Thus, at present, it contains in total 100 subjects. On these subjects only the Parliament can make laws and no other authority. This list includes subjects or items or matters of defence foreign affairs, banking, insurance, currency and coinages, union duties and taxes etc.

List II or the State List: It consists of 66 subjects. But entries 11, 19, 20, 29 and 36 have been deleted by constitutional amendments. Hence, at present, it contains in total 61 subjects. On these subjects the State Legislatures shall have exclusive power of legislation. This list includes subjects such as public order and police, local Government, public health and sanitation, agriculture, forest, fisheries, States taxes and duties etc.

List III or Concurrent List: It consists 47 subjects. New entries 11-A, 17-A, 17-B, 20-A and 33-A have been added by different constitutional amendments. Thus, at present, it contains in total 52 items. This list covers those subjects on which both Parliament and State Legislature can legislate. This list contains subjects such as criminal law and procedure, civil procedure, marriage, Contracts, torts, trusts, welfare of labour, economic and social planning and education etc.

The Union Parliament is empowered to make laws in respect of the subjects of national importance viz., defence, foreign affairs etc. contained in the Union List. The State List contains the subjects of local importance viz., Public Order and Police, Agriculture, Forest etc. and the Legislature of the State concerned is empowered to make laws. The Concurrent List consists of 47 subjects in respect of which both the Centre and States can make laws. In the event of conflict between the two, Central Law prevails over the State Law.

(i) The Doctrine of Pith and Substance

The Union and States are vested with the legislative power in specified subjects. However, the Centre or State may encroach upon the other's subject, while passing a legislation. In such situation, the Court, in order to determine the competence, applies the 'Doctrine of Pith and Substance.'

The word 'Pith' means "true nature" or "essence" and the word 'substance' means "the essential nature underlying a phenomenon". Thus, the expression "pith and substance" collectively relates to find out the true nature of a particular statute. The purpose of this doctrine is to decide, whether a State, while making a statute upon a subject under the Union List, has acted within its rights/limits. In other words, the doctrine aims to decide the legislative competence of the legislature (Central and State), which passed the law in question. In order to ascertain the true character of the legislation, one must have regard to the enactment as a whole, to its object and to the scope and effect of its provision.

The doctrine of Pith and Substance, for the first time, was applied by the Privy Council in:

***Prafulla Kumar Mukherjee v. Bank of Khulma* (AIR 1947 PC 60)**– In this case, the validity of the Bengal Money Lenders' Act, 1946 passed by the Bengal Legislature, was challenged on the ground that it related to 'Promissory Notes' which was a central subject. The Privy Council held that the Act was in Pith and Substance a law in respect of money lending, a State subject and was valid though it trenched upon the 'Promissory Note', a Central subject.

In ***B.Viswanathiah v. State of Karnataka* (1991) 3 SCC 358)**– it has been observed that no question of conflict between two lists will arise if the impugned legislation by the application of the doctrine of 'pith and substance' appears to fall exclusively under one list, and the encroachment upon another list is only incidental.

In ***Welfare Association, Maharashtra v. Ranjit P. Gohil*** **(AIR 2003 SC 1266)**– it has been observed that in every case where the legislative competence of a legislature in regard to a particular enactment is challenged with reference to the entries in the various lists, it is necessary to examine the pith and substance of the Act to find out if the matter comes substantially within an item in the list. The express words employed in an entry would necessarily include incidental and ancillary matters so as to make the legislation effective.

State of Bombay v. F.N. Balsara **(AIR 1951 SC 318)**– In this case, the Bombay Prohibition Act, which prohibited sale and possession of liquors in the State, was challenged on the ground that it incidentally encroached upon import and export of liquors across custom frontier– a Central subject. It was contended that the prohibition, purchase, use, possession and sale of liquor will affect its import. The Court held the Act valid because the pith and substance of the Act fell under the State List and not under Union List even though the Act incidentally encroached upon the Union Powers of Legislation.

In ***State of West Bengal v. Kesoram Industries Ltd.*** **(2004 AIR SCW 5998)**– the Court has held that Courts have to ignore the name given to the acts by the legislature and must also disregard the incidental and superficial encroachments of the act and has to see where the impact of the legislation falls. It must then decide the constitutionality of the Act.

In ***Ishwari Khetal Sugar Mills v. State of U.P*** **(AIR 1980 SC 1955)**– the validity of the U.P Sugar Undertakings (Acquisition) Act, 1971 was challenged on the ground that the State Legislature had no competence to enact the impugned law on the ground that it fell under Parliament's legislative power under Entry 52 of List I. It has been held that the U.P. Sugar Undertaking (Acquisition) Act, 1971 is valid on the ground that the pith and substance of the Act fell under Entry 42 of the List III (Concurrent List) and therefore it was *intra vires* and valid.

In ***State of Kerala v. M.T Devassia*** **(AIR 1977 SC 331)**– it has been observed that a statute, which is in pith and substance within the competence of the State Legislature, will be valid, even though it incidentally encroaches on the subjects reserved for Parliament. Such encroachments are permissible so long there is no conflict between the law enacted by the Parliament and that enacted by the State Legislature.

Repugnancy between a Central Law and a State Law (Article 254): Article 254 of the constitution lays down the provisions in the event of conflict/inconsistency between laws made by the legislatures of the States. It runs as follows–

(1) If any provision of a law made by the Legislature of a State is repugnant to any provision of a law made by Parliament which Parliament is competent to enact, or to any provision of an existing law with respect to one of the matters enumerated in the Concurrent List, then, subject o the provisions of clause (2), the law made by Parliament, whether passed before or after the law made by the Legislature of such State, or, as the case may be, the existing law, shall prevail and the law made by the Legislature of the State shall, to the extent of the repugnancy, be void.

(2) Where a law made by the Legislature of a State with respect to one of the matters enumerated in the Concurrent List contains any provision repugnant to the provisions of an earlier law made by Parliament or an existing law with respect to that matter, then, the law so made by the Legislature of such State shall, if it has been reserved for the consideration of the President and has received his assent, prevail in that State:

Provided that nothing in this clause shall prevent Parliament from enacting at any time any law with respect to the same matter including a law adding to, amending, varying or repealing the law so made by the Legislature of the State.

Article 254 says that if any provision of law made by the Legislature of the State is repugnant to any provision of a law made by Parliament which is competent to enact or to any provision of the existing law with respect to one of the matters enumerated in the Concurrent List, then the law made by Parliament, whether passed before or after the law made by the Legislature of such state or, as the case may be, the existing law shall prevail and the law made by the Legislature of the State shall, to the extent of the repugnancy be void.

Article 254(1) only applies where there is inconsistency between a Central Law and a State Law relating to a subject mentioned in the Concurrent List. But the question is, how the repugnancy is to be determined? In ***M. Karunanidhi v. Union of India* (AIR 1979 SC 898)** - Fazal Ali, J. reviewed all its earlier decisions and summarised the test of repugnancy.

(ii) The Doctrine of Colourable Legislation

Indian Constitution provides for the distribution of legislative powers between the Union Centre and States. The State Legislatures are empowered under delegated legislation, to pass laws subject to the provisions of the constitution. In case, any law passed by the state legislature, as a whole in part is found contrary or inconsistent with any provision/provisions of the Constitution is declared unconstitutional and void.

The doctrine of "Colorable Legislation" is based on the maxim/principle 'What cannot be done directly cannot be done indirectly'. The court evolved this doctrine to invalidate the indirect legislations, which are *ultra vires* (ultra means beyond, vires means power. Ultra vires means beyond the power conferred or exercising the power beyond limits) the scheme of the distribution of the legislative powers between the Centre and States.

Colourable legislation would emerge when the legislature has no power to legislate on an item either because it is not included in the list assigned to it under the respective entries in the Seventh

Schedule of the Constitution or on account of limitation imposed either under Part III of the Constitution relating to the Fundamental Rights or any other power under the Constitution. As the legislature enacts a statute on an assumption of such power, but when on examination it is found that it has travelled beyond its power or competence or in transgression of the limitation imposed by the Constitution itself, such an enactment is called a colourable legislation. It has reference to the legislative competence and not to the power as such. If the legislature enacts law in the pretext of the exercise of its legislative power though it did not possess such power, the legislation to that extent becomes void as the legislature makes its Act only in pretence of and in purported colourable exercise of its power. It does not involve any question of '*bona fide*' or '*mala fide*' on the part of the Constitution.' A thing is colourable when it seems to be one thing in the appearance but another thing underneath.

***K.C.G. Narayan Dev v. State of Orissa* (AIR 1953 SC 375)**– in this case, the doctrine of 'Colourable Legislation' has been coined for the first time by Justice B.K.Mukherjee of the Supreme Court. In this case it has been observed, 'If the Constitution distributes the legislative power amongst different legislative bodies, which have to act within their respective spheres marked out by specific legislative Entries, or if there are limitations on the legislative authority in the shape of fundamental rights, question arises as to whether the legislature in a particular case has or has not, in respect to the subject-matter of the statute or in the method of enacting it, transgressed the limits of its constitutional powers. Such transgression may be patent, manifest or direct, but it may also be disguised, covert or indirect, or and it is to this latter class of cases that the expression, colourable legislation has been applied in judicial pronouncements. The idea conveyed by the expression is that although apparently a legislature in passing a statute purported to act within the limits of its powers, yet in substance and in reality it transgressed these powers, the transgression being veiled by what

appears, on proper examination, to be a mere pretence or disguise..... In other words, it is the substance of the Act that is material and not merely the form or outward appearance, and if the subject-matter in substance is something which is beyond the powers of that legislature to legislate upon the form in which the law is clothed cannot save it from condemnation. The legislature cannot violate the constitutional prohibitions by employing indirect methods.' In this case, the validity of Orissa Agricultural Tax (Amendment) Act, 1950 was in question. The argument was that it was not a *bona fide* taxation law but a colourable legislation whose main motive was to artificially lower the income of the intermediaries so that the State has to pay less compensation to them under Orissa Estates Abolition Act, 1952. The Supreme Court held that it was not colourable legislation because the State was well within its power to set the taxes, no matter how unjust it was. The State is also empowered to adopt any method of compensation. The motive of the legislature in enacting a law is totally irrelevant.

Thus, the doctrine is based on the underlying principle/maxim that "you cannot do indirectly, what you cannot do directly." In such cases, the court will look into the matter as to the true nature and object of the legislature.

In ***K.T. Moopil Nair v. State of Kerala*** **(AIR 1961 SC 252)**– the State imposed a tax under Travencore Cochin Land Tax Act, 1955, which was so high that it was many times the annual income that the person was earning from the land. The Supreme Court held the act as violative of Articles 14 and 19(1)(f) and to be invalid on the ground that the Act apparently purported to be a Taxing Act but in reality it was not a Taxing Act but was confiscatory in character.

In ***State of Bihar v. Kameswar Singh,*** **AIR 1952 SC 252**– In this case, the Bihar Land Reforms Act, 1950 was held void on the ground of colourable Legislation.

In ***Balaji v. State of Mysore*** **(AIR 1963 SC 649)–** the Supreme Court held that the order reserving 68% of the seats for students belonging to backward classes was violative of Article 14 in disguise of making a provision under Article 15(4).

2. ADMINISTRATIVE RELATIONS (ARTICLES 256-263)

The Administrative Relations between the Union and States can be broadly categorized under two heads, namely–

1. During the period of Emergency and
2. During Peace Time (Normal Times) (Articles 256 to 263).

1. Administrative Relations between the Union and States during the period of Emergency: During the period of emergency the autonomy/independence of the State/States stands suspended and all the powers of administration are vested in the Central/Union Government. The Union Government functions like that of a Unitary Government during the period of emergency.

2. Administrative Relations between the Union and States during Peace Time/Normal Times: Articles 256 to 263 (including Article 257.A inserted by the Constitution (Forty-second Amendment) Act, 1976 and repealed by the Constitution (Forty-fourth Amendment) Act, 1978, 258.A (inserted by the Constitution (Seventh Amendment) Act, 1956 (Sec.18 w.e.f. 01-11-1956). Articles 256 to 261 lay down the provisions in general, namely–

1) Obligation of States and the Union (Articles 256).
2) Control of Union over States in certain cases (Article 257).
3) Power of the Union to confer powers, etc. on states in certain cases (Article 258).
4) Power of the States to entrust functions to the Union (Article 258.A). (Article 259, which dealt with Armed Forces in States in Part B of the First Schedule was repealed by the

Constitution (Seventh Amendment) Act, 1956, Section 29 and Schedule w.e.f. 01-11-1956).

5) Jurisdiction of the Union in relation to territories outside India (Article 260) and

6) Public acts, records and judicial proceedings (Article 261).

Further, Article 262 deals with adjudication of disputes relating to waters of inter-State rivers or river valleys and finally Article 263 lays down the provisions with respect to an inter-State Council of the Constitution lay down the provisions relating to 'Administrative Relations' between the Union and States, as stated hereunder.

1. Direction by the Union to States (Article 256).
2. Delegation of Authority (Article 258).
3. Power of the States to entrust functions to the Union (Article 258A).
4. Jurisdiction of the Union in relation to territories outside India (Article 260).
5. Public acts, records and judicial proceedings (Article 261).
6. All India Services (Article 312).
7. Grant in Aid.
8. Other Powers of Peace Times/Normal Times, and
9. Disputes relating to Waters (Article 262).

1.Direction by the Union to States: Article 256 of the Constitution deals with 'Obligation of States and the Union. It runs as follows–

The executive power of every State shall be so exercised as to ensure compliance with the laws made by Parliament and any existing laws which apply in that State, and the executive power of the Union shall extend to the giving of such directions to a State as may appear to the Government of India to be necessary for the purpose.

According to Article 256, the Centre can exercise its power subject to laws passed by Parliament. The Union can extend its power to States by giving direction.

However, in this case ***State of Rajasthan v. Union of India*** **(AIR 1977 SC '1361)** - the Supreme Court has observed that the Union cannot interfere in any matter pertaining to the exclusive concern of the State by giving direction. A direction having such effect will not be binding on the State. For example, a direction given by the union to the Chief Minister to recommend to the Governor for the dissolution of Legislative Assembly is not binding as it is a matter purely concerning the State.

In this case, ***A.D.M. Jalalpur v. S.Shukla*** **(AIR 1976 SC 1361)–** it has been held that no court is likely to entertain a grievance at the instance of a private party that Article 256 has not been complied with by a State Government. Hence if the direction of the union to the State is not complied with by the State, a private party will have no cause of action on the ground of such default.

2. Delegation of Authority: Article 258 of Constitution speaks about delegation of authority by which the Union Parliament confers in State legislatures to make laws subject to/in consonance with the provisions of the constitution. This transfer of law making power of Parliament (Supreme Legislature) to the subordinate legislatures (State Legislatures) is called "Delegated Legislation" or "Delegation of Authority to pass laws". Article 258 reads as follows–

(1) Notwithstanding anything in this Constitution, the President may, with the consent of the Governor of a State, entrust either conditionally or unconditionally to that Government or to its officers functions in relation to any matter to which the executive power of the Union extends.

(2) A law made by Parliament which applies in any State may, notwithstanding that it relates to a matter with respect to which the

Legislature of the State has no power to make laws, confer powers and impose duties, or authorize the conferring of powers and the imposition of duties, upon the State or officers and authorities thereof.

(3) Where by virtue of this Article powers and duties have been conferred or imposed upon a State or officers or authorities thereof, there shall be paid by the Government of India to the State such sum as may be agreed, or, in default of agreement, as may be determined by an arbitrator appointed by the Chief Justice of India, in respect of any extra costs of administration incurred by the State in connection with the exercise of those powers and duties.

According to Article 258, the Union Parliament, with the consent of the State Governments entrust to the State Government or its officers, the matters relating to the executive powers of the Union. Similarly, the State Government also can delegate its power to the Union and its Officers.

In ***Abdul Samad v. State*** **(AIR 1962 SC 1506)** - it has been held that the notification issued by the President of India under Article 258 of the Constitution delegating and entrusting the power to the Government of Jammu and Kashmir to order deportation of foreigner as not illegal.

3. Power of the States to entrust functions to the union (Article 358.A): According to Article 258.A of the Constitution, the Governor of a State may, with the consent of the Government of India, entrust either conditionally or unconditionally to that Government or to its officers functions in relating to any matter to which the executive power of the State extends.

4. Jurisdiction of the union in relation to territories outside India (Article 260): Article 260 of the Constitution provides that the Government of India may by agreement with the Government of any territory not being part of the territory of India undertake any executive, legislative or judicial functions vested in

the Government of such territory, but every such agreement shall be subject to, and governed by, any law relating to the exercise of foreign jurisdiction for the time being in force.

5. Public acts, records and judicial proceedings (Article 261): Article 261 of the Constitution provides that:

1. Full faith and credit shall be given throughout the territory of India to public acts, records and judicial proceedings of the union and of every State.
2. The manner in which and the conditions under which the acts, records and proceedings referred to in Clause (1) shall be proved and the effect thereof determined shall be as provided by law made by Parliament.
3. Final judgements or orders delivered or passed by Civil Courts in any part of the territory of India shall be capable of execution anywhere within that territory according to law.

6. All-India Services (Article 312): Article 312 provides for the creation of 'All India Services' common to the Union and the States to ensure greater inter-State Co-ordination. It reads as follows:

(1) Notwithstanding anything in (Chapter VI of Part VI or Part XI), if the Council of States has declared by resolution supported by not less than two-thirds of the members present and voting that it is necessary or expedient in the national interest so to do, Parliament may by law provide for the creation of one or more all-India services (including an all-India Judicial service) common to the Union and the States, and, subject to the other provisions of this Chapter, regulate the recruitment, and the conditions of service of persons appointed, to any such service.

(2) The services known at the commencement of this Constitution as the Indian Administrative Service and the Indian Police Service shall be deemed to be services created by Parliament under this article.

(3) The all-India Judicial Service referred to in clause (1) shall not include any post inferior to that of a district judge as defined in Article 236.

(4) The law providing for the creation of the all-India Judicial Service aforesaid may contain such provisions for the amendment of Chapter VI of Part VI as may be necessary for giving effect to the provisions of that law and no such law shall be deemed to be an amendment of this Constitution for the purposes of Article 368.

7. Grants-in-Aid: The Central Government makes grants-in-aid to the States for two purposes:

1. to exercise control over the States; and
2. to generate Centre-State Co-ordination and to co-operate/ assist the States in implementing the Welfare Schemes.

8. Other powers of Peace Times/Normal Times:

i) To ensure drawing and execution of schemes specified in the directions to be essential for the welfare of the Scheduled Tribes in the State (Article 339(2).

ii) To ensure the provision of adequate facilities for instruction in the mother-tongue at the primary stage of education to children belonging to linguistic minority groups (Article 350A).

iii) To ensure the development of the Hindi Language (Article 351).

iv) To ensure that the government of a State is carried on in accordance with the provisions of the Constitution (Article 355).

9. Disputes Relating to Water (Article 262): Article 262 of the Constitution provides for adjudication (settlement) machinery to resolve the water disputes between/among the States. It reads as follows:

(1) Parliament may by law provide for the adjudication of any dispute or complaint with respect to the use, distribution

or control of the waters of, or in, any inter-State river or river valley.

(2) Notwithstanding anything in this Constitution, Parliament may by law provide that neither the Supreme Court nor any other court shall exercise jurisdiction in respect of any such dispute or complaint as is referred to in clause (1).

3. FINANCIAL RELATIONS (ARTICLES 264-293)

Part XII containing Articles 264 to 293 (including 268.A inserted by the Constitution (Eighty-eighth Amendment) Act, 2003 (Sec.2), 290.A (inserted by the Constitution (Seventh Amendment) Act, 1956, Section 19 w.e.f. 01-11-1956) and Article 300.A (inserted by the Constitution (Forty-fourth Amendment) Act, 1978, Section 34, w.e.f. 20-06-1979) divided into four chapters lays down the provisions relating to Financial Relations of the Union and the States. Chapter I consisting of Articles 264 to 267 contains the provisions in general namely (1) Interpretation (Article 264), (2) Taxes not to be imposed save by authority of law (Article 265), (3) Contingency Fund (Article 267). Articles 268 to 281 of Chapter I deals with the distribution of revenue between the Union and States. The remaining Articles from 282 to 291 of Chapter I constitute miscellaneous financial provisions. The provisions relating to borrowing are enshrined in Chapter II containing Articles 292 and 293. Chapter III containing Articles 294 to 300 lays down the provisions relating to property, contracts, rights, liabilities, obligations and suits. Finally Chapter IV containing only one Article 300.A speaks about the conversion of Right to Property from fundamental right into/as legal rights. In other words, Article 300.A of Chapter IV inserted by the Constitution (Forty-fourth Amendment) Act, 1978, Section 34, w.e.f. 20-06-1979) enunciates that Right to Property is no more a fundamental right but a legal right only.

For smooth and successful conduct of the legislative and executive relations, there must exist financial autonomy. According to D.D.Basu (in his "Introduction of the Constitution of India', Page 141), "No system of federation can be successful unless both Union and States have at their disposal, adequate financial resources to enable them to discharge their respective responsibilities under the Constitution". The main and major source of income/revenue of the Government is tax revenue.

Article 265 says that "No tax shall be levied or collected except by authority of Law."

Article 265 of the Constitution of India is mandatory and it lays a limitation upon the State. Any Act of the State which seeks to impose a tax without a legislative action will be held to be void. Article 226 of the Constitution of India can be invoked for quashing an imposition made without the authority of the law or which is *ultra vires.*

Taxation in order to be valid must not merely be authorized by the statute but also be levied or collected in strict conformity with the statute which authorized it. A tax statute in order to be valid, must be in conformity with the following:

1. No tax can be imposed by a rule or by law or regulation unless the statute under which subordinate legislation made specifically authorised the imposition. In ***Devidas v. State of Punjab*** **(AIR 1967 SC 1895)**– the supreme Court clearly laid down that a legislature could not confer power to fix the rate of tax to the Government or to the administrative authorities, unless the maximum rate of tax was specified by the legislature itself.
2. The basis of the statutory power conferred by the statute cannot be transferred by the rule making authority.
3. The imposition of tax must also be made in the manner prescribed by law.

4. When the statute provides that a subordinate authority can levy an imposition with the sanction of a specified authority an imposition made without the sanction of that authority is invalid.
5. Where a statute authorities the imposition of fee for certain services to be rendered subordinate legislation cannot provide for the imposition of a tax, unrelated to the service in the name of Fee.

In *Avinder Singh v. State of Punjab* (AIR 1979 SC 321) - it is held that there is nothing in Article 265 of the Constitution of India which prohibits the legislature to impose a tax twice on a thing. Thus, double taxation is not prohibited under Article 265 of the Constitution of India.

Consolidated Funds and Public Accounts of India and of the States (Article 266): Article 266 of the Constitution provides that–

(1) Subject to the provisions of Article 267 and to the provisions of this chapter with respect to the assignment of the whole or part of the net proceeds of certain taxes and duties to States all revenues received by the Government of India, all loans raised by that Government by the issue of treasury bills, loans or ways and means advances and all moneys received by that Government in repayment of loans shall form one consolidated funds to be entitled "the Consolidated Fund of India", and all revenues received by the Government of a State, all Loans raised by that Government by the issue of treasury bills, loans or ways and means advances and all moneys received by that Government in repayment of loans shall form one consolidated fund to be entitled "the Consolidated fund of the State".

(2) All other public moneys received by or on behalf of the Government of India or the Government of a State shall be credited to the public account of India or the public account of the State, as the case may be.

(3) No moneys out of the Consolidated Fund of India or the Consolidated Fund of a State shall be appropriated except in accordance with law and for the purposes and in the manner provided in this Constitution.

Contingency Fund (Article 267): Article 267 of the Constitution provides that–

(1) Parliament may by law establish a Contingency Fund in the nature of an imprest to be entitled "the Contingency Fund of India" into which shall be paid from time to time such sums as may be determined by such law, and the said Fund shall be placed at the disposal of the President to enable advances to be made by him out of such fund for the purposes of meeting unforeseen expenditure pending authorization of such expenditure by Parliament by law under Article 115 or Article 116.

(2) The Legislature of a State may by law establish a Contingency Fund in the nature of an imprest to be entitled "the Contingency Fund of the State" into which shall be paid from time to time such sums as may be determined by such law, and the said Fund shall be placed at the disposal of the Governor of the State to enable advances to be made by him out of such Fund for the purposes of meeting unforeseen expenditure pending authorization of such expenditure by the Legislature of the State by law under Article 205 or Article 206.

Distribution of Revenue between the Union and the States (Articles 268-281): Constitution of India has made elaborate provisions, mainly following the lines of the Government of India Act, 1935, relating to the distribution of the taxes as well as non-tax revenues and the power of borrowing, supplemented by provisions for grants-in-aid by the Union to the States. Indian Constitution contained the scheme of financial relation of flexible and adaptable nature to varying needs and reviewable periodically in the light of experience of Central resources, of State's needs. The States possess exclusive jurisdiction over taxes enumerated in

the State List. The Union is entitled to the proceeds of the taxes in the Union List. The Concurrent List includes no taxes. However, it is to be noted that while the proceeds of taxes within the State Lists are entirely retained by the States. Proceeds of some of taxes in the Union List may allow, wholly or partially to the States. The Constitution mentions following Categories of the Union taxes which are wholly or partially assigned to the States.

Duties levied by the Union, but collected and appropriated by the States (Article 268): Article 268 of the Constitution provides that—

(1) Such Stamp duties as are mentioned in the Union List shall be levied by the Government of India but shall be collected:

a) In the case where such duties are leviable within any Union territory, by the Government of India; and

b) In other cases, by the States within which such duties are respectively leviable;

(2) The proceeds in any financial year of any such duty leviable within any State shall not form part of the Consolidated Fund of India, but shall be assigned to that State.

Taxes levied and Collected by the Union but assigned to the States (Article 269): Article 269 of the Constitution provides that—

(1) Taxes on the sales or purchase of goods and taxes on the consignment of goods except as provided in Article 269A shall be levied and collected by the Government of India but shall be assigned and shall be deemed to have been assigned to the States on or after the 1st day of April, 1996 in the manner provided in clause (2).

a) The expression "taxes on the sale or purchase of goods" shall mean taxes on sale or purchase of goods other than newspapers, where such sale or purchase takes place in the course of inter-State trade or commerce.

b) The expression "taxes on the consignment of goods" shall mean taxes on the consignment of goods (whether the consignment is to the person making it or to any other person) where such consignment takes place in the course of interstate trade or commerce.

(2) The net proceeds in any financial year of any such tax, except in so far as those proceeds represent proceeds attributable to Union territories, shall not form part of the Consolidated Fund of India, but shall be assigned to the States within which that tax is leviable in that year, and shall be distributed among those States in accordance with such principles of distribution as may be formulated by Parliament by law.

(3) Parliament may by law formulate principles for determining when a sale of purchase of, or consignment of, goods takes place in the course of inter-State trade or commerce.

Levy and collection of goods and services tax in course of inter-State trade or commerce (Article 269A): (1) Goods and services tax on supplies in the course of inter-State trade or commerce shall be levied and collected by the Government of India and such tax shall be apportioned between the Union and the States in the manner as may be provided by Parliament by law on the recommendations of the Goods and Services Tax Council.

Explanation: For the purposes of this clause, supply of goods, or of services, or both in the course of import into the territory of India shall be deemed to be supply of goods, or of services, or both in the course of inter-State trade or commerce.

(2) The amount apportioned to a State under clause (1) shall not form part of the Consolidated Fund of India.

(3) Where an amount collected as tax levied under clause (1) has been used for payment of the tax levied by a State under Article 246A, such amount shall not form part of the Consolidated Fund of India.

(4) Where an amount collected as tax levied by a State under Article 246A has been used for payment of the tax levied under clause (1), such amount shall not form part of the Consolidated Fund of the State.

(5) Parliament may, by law, formulate the principles for determining the place of supply, and when a supply of goods, or of services, or both takes place in the course of inter-State trade or commerce.

Taxes levied and distributed between the Union and the States (Article 270): Article 270 of the Constitution provides that–

(1) All taxes and duties referred to in the Union List, except the duties and taxes referred to in Articles 268, 269 and 269A, respectively, surcharge on taxes and duties referred to in Article 271 and any cess levied for specific purposes under any law made by Parliament shall be levied and collected by the Government of India and shall be distributed between the Union and the States in the manner provided in clause (2).

(1A) The tax collected by the Union under clause (1) of Article 246A shall also be distributed between the Union and the States in the manner provided in clause (2).

(1B) The tax levied and collected by the Union under clause (2) of Article 246A and Article 269A, which has been used for payment of the tax levied by the Union under clause (1) of Article 246A, and the amount apportioned to the Union under clause (1) of Article 269A, shall also be distributed between the Union and the States in the manner provided in clause (2).

(2) Such percentage, as may be prescribed, of the net proceeds of any such tax or duty in any financial year shall not form part of the Consolidated Fund of India, but shall be assigned to the States within which that tax or duty is leviable in that year, and shall be distributed among those States in such manner and from such time as may be prescribed in the manner provided in clause (3).

(3) In this article, "Prescribed" means:

i) Until a Finance Commission has been constituted, prescribed by the President by order, and

ii) After a Finance Commission has been constituted prescribed by the President by order after considering the recommendations of the Finance Commission.

Surcharge on certain duties and taxes for purposes of the Union (Article 271): Notwithstanding anything in Articles 269 and 270, Parliament may at any time increase any of the duties or taxes referred to in those Articles by a surcharge for purposes of the Union and the whole proceeds of any such surcharge shall form part of the Consolidated Fund of India.

Grants in lieu of export duty on jute and jute products (Article 273): (1) There shall be charged on the Consolidated Fund of India in each year as grants-in-aid of the revenues of the States of Assam, Bihar, Odisha and West Bengal, in lieu of assignment of any share of the net proceeds in each year of export duty on jute and jute products to those States, such sums as may be prescribed.

(2) The sums so prescribed shall continue to be charged on the Consolidated Fund of India so long as any export duty on jute or jute products continues to be levied by the Government of India or until the expiration of the years from the commencement of this Constitution, whichever is earlier.

(3) In this article, the expression "prescribed" has the same meaning as in Article 270.

Prior recommendation of President required to Bills affecting taxation in which States are interested (Article 274): (1) No Bill or amendment which imposes or varies any tax or duty in which States are interested, or which varies the meaning of the expression "agricultural income" as defined for the purposes of the enactments relating to Indian Income Tax, or which affects the principles on which under any of the foregoing provisions of this Chapter moneys

are or may be distributable to State, or which imposes any surcharge for the purposes of the Union as is mentioned in the foregoing provisions of this Chapter, shall be introduced or moved in either House of Parliament except on the recommendation of the President.

(2) In this article, the expression "tax or duty in which States are interested" means–

a) A tax or duty the whole or part of the net proceeds whereof are assigned to any State, or

b) A tax or duty by reference to the net proceeds whereof sums are for the time being payable out of the Consolidated Fund of India to any State.

Grants from the Union to certain States (Article 275): (1) Such sums as Parliament may by law provide shall be changed on the Consolidated Fund of India in each year as grants-in-aid of the revenues of such States as Parliament may determine to be in need of assistance, and different sums may be fixed for different States:

Provided that there shall be paid out of the Consolidated Fund of India as grants-in-aid of the revenues of a State such capital and recurring sums as may be necessary to enable that State to meet the costs of such schemes of development as may be undertaken by the State with the approval of the Government of India for the purpose of promoting the welfare of the Scheduled Tribes in that State or raising the level of administration of the Scheduled Areas therein to that of the administration of the rest of the areas of that State:

Provided further that there shall be paid out of the Consolidated Fund of India as grants-in-aid of the revenues of the State of Assam sums, capital and recurring, equivalent to–

a) The average excess of expenditure over the revenues during the two years immediately preceding the commencement of this Constitution in respect of the administration of the tribal areas specified in (part 1) of the table appended to paragraph 20 of the Sixth Schedule, and

b) The costs of such schemes of development as may be undertaken by that State with the approval of the Government of India for the purpose of raising the level of administration of the said areas to that of the administration of the rest of the areas of that state.

(1.A) On and from the formation of the autonomous State under Article 244.A–

i) any sums payable under clause (a) of the second proviso to clause (1) shall, if the autonomous State comprises of all the tribal areas referred to therein, be paid to the autonomous State, and, if the autonomous State comprises only some of those tribal areas, be appointed between the State of Assam and the autonomous State as the President may, by order, specify;

ii) there shall be paid out of the Consolidated Fund of India as grants-in-aid of the revenues of the autonomous State sums, capital and recurring, equivalent to the costs of such schemes of development as may be undertaken by the autonomous State with the approval of the Government of India for the purpose of raising the level of administration of that State to that of the administration of the rest of the State of Assam.

(2) Until provision is made by Parliament under clause (1), the powers conferred on Parliament under that clause shall be exercisable by the President by order and any order made by the President under this clause shall have effect subject to any provision so made by Parliament:

Provided that after a Finance Commission has been constituted no order shall be made under this clause by the President except after considering the recommendations of the Finance Commission.

Taxes on professions, trades, callings and employments (Article 276): (1) Notwithstanding anything in Article 246, no law of the Legislature of a State relating to taxes for the benefit of the State or of a municipality, district board, local board or other local authority

therein in respect of professions, trades, callings or employments shall be invalid on the ground that it relates to a tax on income.

(2) The total amount payable in respect of any one person to the State or to any one municipality, district, local board or other local authority in the State by way of taxes on professions, trades, callings and employments shall not exceed (two thousand and five hundred rupees) per annum.

(3) The power of the Legislature of a State to make laws as aforesaid with respect to taxes on professions, trades, callings and employments shall not be construed as limiting in any way the power of Parliament to make laws with respect to taxes on income accruing from or arising out of professions, trades, callings, and employments.

Savings (Article 277): Any taxes, duties, cesses or fees which, immediately before the commencement of this Constitution, were being lawfully levied by the Government of any State or by any municipality or other local authority or body for the purposes of the State, municipality, district or other local area may, notwithstanding that those taxes, duties, cesses or fees are mentioned in the Union List, continue to be levied and to be applied to the same purposes until provision to the contrary is made by Parliament by law.

Calculations of "net proceeds", etc. (Article 279): (1) In the foregoing provisions of this Chapter, "net proceeds" means in relation to any tax or duty the proceeds thereof reduced by the cost of collection and for the purposes of those provisions the net proceeds of any tax or duty, or of any part of any tax or duty, in or attributable to any areas shall be ascertained and certified by the Comptroller and Auditor General of India, whose certificate shall be final.

(2) Subject as aforesaid, and to any other express provision of this Chapter, a law made by Parliament or any order of the President may, in any case whereunder this Part the proceeds of any duty or tax are, as may be, assigned to any State, provide for the manner in which the proceeds are to be calculated, for the time from or at which and the manner in which any payments are to

be made, for the making of adjustments between one financial year and another, and for any other incidental or ancillary matters.

Article 279A provides for Constitution of Goods and Services Tax Council.

Finance Commission (Article 280): (1) The President shall, within two years from the commencement of this Constitution and thereafter at the expiration of every fifth year or at such earlier time as the President considers necessary, by order constitute a Finance Commission which shall consist of a Chairman and four other members to be appointed by the President.

(2) Parliament may by law determine the qualifications which shall be requisite for appointment as members of the Commission and the manner in which they shall be selected.

(3) It shall be the duty of the Commission to make recommendations to the President as to–

a) The distribution between the Union and the States of the net proceeds of taxes which are to be, or may be, divided between them under this Chapter and the allocation between the States of the respective shares of such proceeds.

b) The principles which should govern the grants-in-aid of the revenue of the States out of the Consolidated Fund of India.

The measures needed to augment the Consolidated Fund of a State to supplement the resources of the Panchayats in the State on the basis of the recommendations made by the Finance Commission of the State.

c) The measures needed to augment the Consolidated Fund of a State to supplement the resources of the Municipalities in the State on the basis of the recommendations made by the Finance Commission of the State.

d) Any other matter referred to the Commission by the President in the interests of sound finance.

(4) The Commission shall determine their procedure and shall have such powers in the performance of their functions as Parliament may by law confer on them.

Recommendations of the Finance Commission (Article 281): The President shall cause every recommendation made by the Finance Commission under the provisions of this Constitution together with an explanatory memorandum as to the action taken thereon to be laid before each House of Parliament.

Exemption of property of the Union from State taxation (Article 285): (1) The property of the Union shall, save in so far as Parliament may by law otherwise provide, be exempt from all taxes imposed by a State or by any authority within a State.

(2) Nothing in clause (1) shall, until Parliament by law otherwise provides, prevent any authority within a State from levying any tax on any property of the Union to which such property was immediately before the commencement of this Constitution liable or treated as liable, so long as that tax continues to be levied in that State.

In *I.A.A.I v. Municipal Court* **(AIR 1991 Del. 302)**– it has been held that property owned by a Government company or a statutory corporation, which has a corporate personality of its own, cannot be said to be 'property of the Union' and may, therefore, be liable to State or municipal taxation.

In *Department of Telecom v. State* **(AIR 1998 Kant 335)**– it has been observed that taxes imposed under Karnataka Motor Vehicles Taxation Act, 1957 is an indirect tax on use of roads and not tax on property. Accordingly, immunity cannot be granted from taxation under Article 285 of the Constitution in respect of the Union Government Vehicles.

Exemption from Taxes on Electricity (Article 287): Article 287 of the Constitution of India provides that save in so

far as parliament may by law otherwise provide, no law of a State shall impose, or authorize the imposition of, a tax on the consumption or sale of electricity (whether produced by a Government or other persons) which is–

a) Consumed by the Government of India or sold to the Government of India for consumption by that Government, or

b) Consumed in the construction, maintenance or operation of any railway by the Government of India or a railway company operating that railway, or sold to that Government or any such railway company for consumption in the construction, maintenance or operation of any railway, and

Any such law imposing, or authorising the imposition of, a tax on the sale of electricity shall secure that the price of electricity sold to the Government of India for consumption by that Government, or to any such railway company as aforesaid for consumption in the constitution, maintenance or operation of any railway, shall be less by the amount of the tax than the price charged to other consumers of a substantial quantity of electricity.

Exemption from taxation by States in respect of water or electricity in certain cases (Article 288): Article 288 of the Constitution of India provides that–

(1) Save in so far as the President may by order otherwise provide, no law of a State in force immediately before the commencement of this constitution shall impose, or authorise the imposition of, a tax in respect of any water or electricity stored, generated, consumed, distributed or sold by any authority established by any existing law or any law made by Parliament for regulating or developing any inter-state river or river-valley.

Explanation: The expression "law of a State in force" in the clause shall include a law of a State passed or made before the commencement of this Constitution and not previously repealed,

notwithstanding that it or parts of it may not be then in operation either at all or in particular areas.

(2) The Legislature of a State may by law impose, or authorise the imposition of, any such tax as is mentioned in clause (i), but no such law shall have any effect unless it has, after having been reserved for the consideration of the president received his assent and if any such law provides for the fixation of the rates and other incidents of such tax by means of rules or orders to be made under the law by any authority, the law shall provide for the previous consent of the President being obtained to the making of any such rue or order.

Exemption of property and income of a State from Union Taxation (Article 289): (1) The property and income of a State shall be exempt from Union Taxation.

(2) Nothing in clause (1) shall prevent the Union from imposing, or authorising the imposition of, any tax to such extent, if any, as Parliament may by law provide in respect of a trade or business of any kind carried on by, or on behalf of, the Government of a State, or any operations connected therewith, or any property used or occupied for the purposes of such trade or business, or any income accruing or arising in connection therewith.

(3) Nothing in clause (2) shall apply to any trade or business, or to any class of trade or business, which Parliament may by law declare to be incidental to the ordinary functions of Government.

In ***Andhra Pradesh State Road Transport v. Union of India*** **(AIR 1964 SC 1486)**– it has been held that the income of the APSRTC is not the income of the State of Andhra Pradesh since the APSRTC is an independent legal entity. The Court observed that the Scheme of Article 289 appears to be that ordinarily, the income derived by a State both from Government

and non-Government or commercial activities shall be immune from the Income Tax levied by the Union, provided, of course, the income in question can be said to be income of the State. Hence Article 289(1) does not avail to the APSRTC is the trading activities carried on by the Corporation are not trading activities carried on by the State departmentally nor they are trading activities carried on by the State through its agents appointed on that behalf.

Adjustment in respect of certain expenses and pensions (Article 290): Article 290 of the Constitution of India provides that whereunder the provisions of this constitution the expenses of any Court or commission, or the pension payable to or in respect of a person who has served before the Commencement of this constitution under the Crown in India or after such commencement in connection with the affairs of the Union or of a State, are charged on the Consolidated Fund of India or the Consolidated Fund of a State, then, if–

a) In the case of a charge on the Consolidated Fund of India, the Court or Commission serves any of the separate needs of a State or the person has served wholly or in part in connection with the affairs of a State; or

b) In the case of a charge on the Consolidated Fund of a State, the court or commission serves any of the separate needs of the Union or another State, or the person has served wholly or in part in connection with the affairs of the Union or another State;

There shall be charged on and paid out of the Consolidated Fund of the State or, as the case may be, the Consolidated Fund of India or the Consolidated Fund of the other State, such contribution in respect of the expenses or pension as may be agreed, or as may in default of agreement be determined by an arbitrator to be appointed by the Chief Justice of India.

Annual payment to certain Devaswom Funds (Article 290.A): Article 290.A of the Constitution of India provides that a sum of forty-six lakhs and fifty thousand rupees shall be charged on, and paid out of, the Consolidated Fund of the State of Kerala every year to the Travancore Devaswom Fund; and a sum of thirteen lakhs and fifty thousand rupees shall be charged on, and paid out of the Consolidated Fund of the State of Tamil Nadu, every year to the Devaswom Fund established in that State for the maintenance of Hindu Temples and shrines in the territories transferred to that State on the 1st day of November, 1956, from the State of Travancore– Cochin.

Borrowing by the Government of India (Article 292): The executing power of the Union extends to borrowing upon the security of the Consolidated Fund of India within such limits, if any, as may from time to time be fixed by Parliament by law and to the giving of guarantees within such limits, if any, as may be so fixed.

Borrowing by States (Article 293): (1) Subject to the provisions of this article, the executive power of a State extends to borrowing within the territory of India upon the security of the Consolidated Fund of the State within such limits, if any, as may from time to time be fixed by the Legislature of such State by law and to the giving of guarantees within such limits, if any, as may be so fixed.

(2) The Government of India may, subject to such conditions as may be laid down by or under any law made by Parliament, make loans to any State or, so long as any limits fixed under Article 292 are not exceeded, give guarantees in respect of loans raised by any State, and any sums required for the purpose of making such loans shall be charged on the Consolidated Fund of India.

(3) A state may not without the consent of the Government of India raise any loan if there is still outstanding any part of a loan

which has been made to the State by the government of India or by its predecessor Government, or in respect of which a guarantee has been given by the Government of India or by its predecessor Government.

(4) A consent under clause (3) may be granted subject to such conditions, if any, as the Government of India may think fit to impose.

Succession to property, assets, rights, liabilities and obligations in certain cases (Article 294): As from the commencement of this Constitution–

a) All property and assets which immediately before such commencement were vested in His Majesty for the purposes of the Government of the Dominion of India and all property and assets which immediately before such commencement were vested in His Majesty for the purposes of the Government of each Governor's Province shall vest respectively in the Union and the corresponding State, and

b) All rights, liabilities and obligations of the Government of the Dominion of India and of the Government of each Governor's Province, whether arising out of any contract or otherwise, shall be the rights, liabilities and obligations respectively of the Government of India and the Government of each corresponding State,

Subject to any adjustment made or to be made by reason of the creation before the commencement of this Constitution of the Dominion of Pakistan or of the Provinces of West Bengal, East Bengal, West Punjab and East Punjab.

Succession to property, assets, rights, liabilities and obligations in other cases (Article 295): (1) As from the commencement of this Constitution—

a) All property and assets which immediately before such commencement were vested in any Indian State

corresponding to a State specified in Part B of the First Schedule shall vest in the Union, if the purposes for which such property and assets were held immediately before such commencement will thereafter be purposes of the Union relating to any of the matters enumerated in the Union List, and

b) All rights, liabilities and obligations of the Government of any Indian State corresponding to a State specified in Part B of the First Schedule, whether arising out of any contract or otherwise, shall be the rights, liabilities and obligations of the Government of India, if the purposes for which such rights were acquired or liabilities or obligations were incurred before such commencement will thereafter be purposes of the Government of India relating to any of the matters enumerated in the Union List,

Subject to any agreement entered into in that behalf by the Government of India with the Government of that State.

(2) Subject as aforesaid, the Government of each State specified in Part B of the First Schedule shall, as from the commencement of this Constitution, be the successor of the Government of the corresponding Indian State as regards all property and assets and all rights, liabilities and obligations, whether arising out of any contract or otherwise, other than those referred to in clause (1).

Property accruing by escheat or lapse or as *bona vacantia* (Article 296): Subject as hereinafter provided any property in the territory of India which, if this Constitution had not come into operation, would have accrued to His Majesty or, as the case may be, to the Ruler of an Indian State by escheat or lapse, or as *bona vacantia* for want of a rightful owner, shall, if it is property situate in a State, vest in such State, and shall, in any other case, vest in the Union:

Provided that any property which at the date when it would have so accrued to His Majesty or to the Ruler of an Indian State was in the possession or under the control of the Government of India or the Government of a State shall, according as the purposes for which it was then used or held were purposes of the Union or a State, vest in the Union or in that State.

Explanation– In this article, the expressions "Ruler" and "Indian State" have the same meaning as in Article 363.

Things of value within territorial waters or continental shelf and resources of the exclusive economic zone to vest in the Union (Article 297): (1) All lands, minerals and other things of value underlying the ocean within the territorial waters, or the continental shelf, or the exclusive economic zone, of India shall vest in the Union and be held for the purposes of the Union.

(2) All other resources of the exclusive economic zone of India shall also vest in the Union and be held for the purposes of the Union.

(3) The limits of the territorial waters, the continental shelf, the exclusive economic zone, and other maritime zones, of India shall be such as may be specified, from time to time, by or under any law made by Parliament.

Power to carry on trade, etc. (Article 298): The executive power of the Union and of each State shall extend to the carrying on of any trade or business and to the acquisition, holding and disposal of property and the making of contracts for any purpose. Provided that–

a) The said executive power of the Union shall, in so far as such trade or business or such purpose is not one with respect to which Parliament may make laws, be subject in each State to legislation by the State, and

b) The said executive power of each State shall, in so far as such trade or business or such purpose is not one with respect to which the State Legislature may make laws, be subject to legislation by Parliament.

Contracts (Article 299): (1) All contracts made in the exercise of the executive power of the Union or of a State shall be expressed to be made by the President, or by the Governor of the State, as the case may be, and all such contracts and all assurances of property made in the exercise of that power shall be executed on behalf of the President or the Governor by such persons and in such manner as he may direct or authorize.

(2) Neither the President nor the Governor shall be personally liable in respect of any contract or assurance made or executed for the purposes of this Constitution, or for the purposes of any enactment relating to the Government of India heretofore in force, nor shall any person making or executing any such contract or assurance on behalf of any of them be personally liable in respect thereof.

Suits and proceedings (Article 300): (1) The Government of India may sue or be sued by the name of the Union of India and the Government of a State may sue or be sued by the name of the State and may, subject to any provisions which may be made by Act of Parliament or of the Legislature of such State enacted by virtue of powers conferred by this Constitution, sue or be sued in relating to their respective affairs in the like cases as the Dominion of India and the corresponding Provinces or the corresponding India States might have sued or been sued if this Constitution had not been enacted.

(2) If at the commencement of this Constitution–

a) Any legal proceedings are pending to which the Dominion of India is a party, the Union of India shall be deemed to be substituted for the Dominion in those proceedings, and

b) Any legal proceedings are pending to which a Province or an Indian State is a party, the corresponding State shall be deemed to be substituted for the Province or the Indian State in those proceedings.

Persons not to be deprived of property save by authority of law (Article 300.A)– No person shall be deprived of his property save by authority of law.

Lecture - VI

State Liability
(Part-XII, Chapter-III: Articles 299 & 300)

Chapter III of Part XII containing Articles 294 to 300 lays down the provisions relating to Property, Contracts, Rights, Liabilities, Obligations and suits in respect of the Union and State Governments. Chapter III deals with (1) Succession to property, assets, rights, liabilities and obligations in certain cases (Article 294), (2) Succession to property, assets, rights, liabilities and obligations in other cases (Article 295), (3) Property accruing by escheat or lapse or as bona vacantia (Article 296), (4) Things of value within territorial waters or continental shelf and resources of the exclusive economic zone to vest in the Union (Article 297), (5) Contract (Article 299), (6) Suits and proceedings (Article 300).

The present lecture deals with the liability of State, liability of the Union and State Governments or simply state liability for civil wrongs viz. breach of contracts and torts committed by its servants (Government/Civil servants) while acting in colour of office i.e. in discharge of their duties under sovereign delegated power.

Article 298 of the Indian Constitution confers on the Union and State Governments, executive power to carry on trade and business by entering into contracts like an individual Article 298 runs as follows:

The executive power of the Union and of each State shall extend to the carrying on of any trade or business and to the acquisition, holding and disposal of property and the making of contracts for any purpose. Provided that–

a) The said executive power of the Union shall, in so far as such trade or business or such purpose is not one with respect to

which Parliament may make laws, be subject in each State to legislation by the State, and

b) The said executive power of each State shall, in so far as such trade or business or such purpose is not one with respect to which the State Legislature may make laws, be subject to legislation by Parliament.

In ***Mahabir Auto v. IOC*** **(AIR 1990 SC 1031)**– it has been held that the freedom of the Government to enter into business with anybody it likes is subject to the condition of reason and fair play as well as public interest.

Articles 299 and 300 of the Constitution lays down the provisions relating to Contractual liability and Tortious Liability respectively of the State i.e. the Union and State Governments for the breach of contracts and torts committed by its servants.

The Government Liability or State Liability, may be explained as follows—

1. Tortious Liability of the State (Article 300).
2. Contractual Liability of the State (Article 299).

1. TORTIOUS LIABILITY OF THE STATE (ARTICLE 300)

Article 300 of the Indian Constitution, which speaks about the Suits and Proceedings, deals with the legal status of the Union and State Governments to sue and be sued in respect of the torts committed by its servants, while discharging their duties on behalf of the Government, the Union or State. Article 300 reads as follows–

(1) The Government of India may sue or be sued by the name of the Union of India and the Government of a State may sue or be sued by the name of the State and may, subject to any provisions which may be made by Act of Parliament or of the Legislature of such State enacted by virtue of powers conferred

by this Constitution, sue or be sued in relating to their respective affairs in the like cases as the Dominion of India and the corresponding Provinces or the corresponding India States might have sued or been sued if this Constitution had not been enacted.

(2) If at the commencement of this Constitution–

a) Any legal proceedings are pending to which the Dominion of India is a party, the Union of India shall be deemed to be substituted for the Dominion in those proceedings, and

b) Any legal proceedings are pending to which a Province or an Indian State is a party, the corresponding State shall be deemed to be substituted for the Province or the Indian State in those proceedings.

Tortious Liability of the State means 'Liability of the State/ Government for the torts committed by its servants. 'Tort' means a civil wrong causing injury or damage to another (injured or aggrieved). The injury may be personal, physical, mental or otherwise and the injured party resorts to remedy by an action in civil court. The remedy may be unliquidated damages or injunction or restitution of property etc.

In view of tremendous growth in administrative functions, being discharged by the Government Servants, danger to another's person or property may take place. Then, the question arises is: whether the Government or State is vicariously liable for the torts committed by its servants? (Vicarious liability means 'liability of one person for the tort (wrong) committed by another.)

Underlying Principle: The doctrine of vicarious liability is based on the following two maxims:

1. *Quasi facit per alium facit per se:* It means "he who does an act through another does it himself."
2. *Respondent Superior:* It means "let the Superior (Principal) be liable."

Position in England: Earlier, the King (Crown) or the State in England enjoyed complete immunity (i.e., not liable) for the torts committed by its servants. This immunity was given on the basis of the well known maxim 'The King can do no wrong'. In course of time, with the increase in functions of the Government and expansion of the Governmental machinery, such immunity was found to be impracticable in the interests of justice and social security. Consequently, the Crown Proceedings Act, 1947 was passed, and the immunity was withdrawn. According to Section 2(1) of the Act, the Crown is vicariously liable like an ordinary individual or any other Employer for the torts committed by the servants.

Position in India: Indian Parliament has not passed any Act like the Crown Proceedings Act, prescribing the tortious liability of the Government/State. However, Article 300 of the Indian Constitution lays down the provisions relating to the liability of the Government/State for the torts committed by its servants. In India also, the Government/ State is vicariously liable for the torts committed by its servants.

Article 300(1) of the Constitution provides that the Government of India may be sued in relation to its affairs in the like case as the Dominion of India, subject to any law, which may be made by Act of Parliament. However, the position and extent of liability is not clear (uncertain) due to lack of proper legislation. Whenever such situation to prescribe State/Government liability arises, the Courts traced back to pre-constitutional period and followed sovereign, non-sovereign dichotomy, enunciated in 1861 in ***P & O Steam Navigation Case*** **(5 Bom. H.C.R. Appl.1).**

Sovereign Immunity: 'Sovereign Immunity' means "exemption (immunity) from liability on the ground of being sovereign." The State or Government is not vicariously liable for the torts committed by its servants (enjoys sovereign immunity) provided the following conditions are satisfied:

1. The tort is committed by the servant in discharge of duty or obligation imposed on him by law.

2. Discharge of such duty, must be in delegation of sovereign power.

Now, the question is, what is sovereign power? And what is non-sovereign power?

Sovereign and Non-sovereign Dichotomy: Peacock, C.J., made a distinction between sovereign power and non-sovereign power in the leading case of:

***P & O Steam Navigation Co. v. Secretary of State for India,* (1861) 5 Bom. H.C.R. App. 1, P.1–** In this case, the plaintiff's servant was travelling in a carriage, driven by two horses through the Kidderpore Dockyard. Due to the negligence of the defendant (Dockyard)'s servant, an iron rod hit the plaintiff's servant and the horses and they were injured. In an action by the plaintiff, the defendant, Co. pleaded immunity on the ground that they were engaged in ship repair process, managed by the East India Company to which sovereign powers were accorded. But Peacock C.J. did not agree with the contention and held the defendant liable.

The Supreme Court of Calcutta through Peacock, C.J. coined the principle of "Sovereign: Non-Sovereign Dichotomy" by drawing a line between sovereign power and non-sovereign power. Though, the crown was accorded sovereign status to the East India Company, ship repairing was a commercial activity which could be carried on by a private person, and hence it is non-sovereign and the defendant Co. was held liable.

Tests: There is no test or definition to distinguish between sovereign and non-sovereign function. However, those functions, which can alone be undertaken by the State/Government viz., army, navy, air-force, Administration of Justice, Law and Order etc. are regarded as sovereign functions. There are some other functions like trade, commerce, roads and buildings, transport, communication etc. may be delegated to any private person or an agency, and hence, they are regarded as non-sovereign functions.

Position of State/Government Liability after the Constitution of India: Even after the Constitution of India came into force, the courts followed sovereign, non-sovereign dichotomy in many cases in spite of the Supreme Court's decision in Vidyavathi's case:

***State of Rajasthan v. Vidyavathi* (AIR 1962 SC 933)**– Vidyavathi's husband died of an accident having knocked down by a Collector's jeep on official trip. On appeal, the Supreme Court through Sinha C.J. held the State liable without taking into consideration, the Sovereign, Non-Sovereign Dichotomy.

In spite of the Supreme Court's decision in ***Vidyavathi's Case,*** the position as to the liability of the Government/State is not certain/clear. Following cases illustrate on this point:

***Kasturilal v. State of Uttar Pradesh* (AIR 1965 SC 1039)**– In this case, Kasturilal's gold was seized by the police under the suspicion that it was the stolen property. The gold was kept in the Police Malkhana under the custody of a Head Constable. He misappropriated the gold and fled for Pakistan. In an action by Kasturilal against the State for recovery of the Gold or its equivalent value, the trial court dismissed the suit. On appeal, the Supreme Court upheld the Trial Court's decision following the rule of sovereign: non-sovereign dichotomy laid down in P & O Steam Navigation Case.

The above rule was followed by the Supreme Court in: ***State of Uttar Pradesh v. Tulasi Ram,* (AIR 1971 All. 162)**– It is to be noted that, to plead the immunity both the conditions stated above are to be satisfied. If either of the two conditions is absent, the State is liable as in the case of ***Hindustan Lever Limited v. State of Uttar Pradesh,* (AIR 1972 All. 486).**

Gross negligence by the Servant: The Government/State is vicariously liable for the gross negligence of its servants. Relevant case on this point is:

***Ramakanda Reddy v. State,* (1989)**– The A.P. High Court held the State liable to pay compensation. In this case, an undertrial

prisoner died owing to negligence of the prison authorities. The Court viewed that the sovereign immunity could no longer be applicable in cases for violation of the right to life and personal liberty guaranteed under Article 21 of the Constitution.

In ***Satyawati Devi v. Union of India*** **(AIR 1967 Delhi 98)**– Air Force personnel played the game and returned by a bus. The bus driver drove the bus negligently causing the death of the husband of the Satyawati Devi. The Court held the Union of India was liable for damages on the ground that carrying of the teams to play the matches was not in the exercise of sovereign function.

In ***State of Orissa v. Padmalochan*** **(AIR 1975 Ori. 41)**– a mob emerged on the scene of the office of the Sub Divisional Officer, Orissa to protest. Military Police and some police personnel manhandled some persons of the mob resulting in injury to plaintiff. The Court observed that although police personnel manhandled the plaintiff without permission of the Magistrate but it occurred while exercising the sovereign power.

In ***Union of India v. Harbans Singh*** **(AIR 1959 Punj. 39)**– meals were being carried from the cantonment, Delhi for distribution to military personnel on duty. The truck carrying meals belonged to the military department and was being driven by a military driver. It caused an accident resulting in the death of a person. It was held that the act was being done in exercise of sovereign power, and therefore, the State could not be made liable for the same.

Existing position in India and the Role of Judiciary: The existing position in India with regard to the Government Liability is not certain. Hence, Gajendra Gadkar C.J., in ***Kasturilal's Case*** expressed dissatisfaction over the lawlessness in respect of the State Liability. However, the judiciary by exercising its discretionary power, removed the uncertainty in the following cases:

The Supreme Court made no distinction between Sovereign and non-sovereign power in ***N.Nagendra Rao & Co. v. State of A.P*** **(AIR 1994 SC 266)**. The Court has held that when due

to the negligent act of the officers of State a citizen suffers any damage the State will be liable to pay compensation and the principle of sovereign immunity of State will not absolve him from this liability. The Court, further, held that in the context of modern concept of sovereignty the doctrine of sovereign immunity stands diluted and the distinction between sovereign and non-sovereign functions no longer exists.

In ***Rudul v. State of Bihar*** **(AIR 1983 SC 1086)**– an acquitted person was detained in prison for more than 14 years. The Supreme Court directed the State to release him immediately and awarded exemplary damage of Rs.35,000/-.

In ***Bhim Singh v. State of Bihar*** **(AIR 1986 SC 494)**– Bhim Singh was awarded Rs.50,000/- as exemplary damages (by the Supreme Court) for unlawful detention.

In ***Sebastian M Hongray v. Union of India*** **(AIR 1984 SC 1026)**– two persons were taken to military camp by the army jawans. The Government failed to produce them before the Court. The Supreme Court awarded exemplary damages of Rs.1,00,000/- each to the wives of the said two persons for having undergone torture, mental agony etc.

In ***Saheli, A women's Resource Centre v. Commissioner of Police,Delhi*** **(AIR 1990 Sc 513)**– a child of 9 years was beaten to death by the Police. The Supreme Court awarded a compensation of Rs.75,000/- to the mother of the child.

In ***Kalawati v. State of Himachal Pradesh*** **(AIR 1989 HP 5)**– two persons died in a Government Hospital owing to negligence of hospital staff who administered nitrous oxide in place of Oxygen to the patients. The Court awarded compensation under Article 21.

In ***Kumari v. State of T.N*** **(AIR 1992 SC 2069)**– a child fell into an 'uncovered sewage tank' and died. The Court directed the State to pay compensation.

In *Govind Kumar v. State of Rajasthan* **(AIR 2009 Raj. 61)**– a 4 year child had died on account of drowning in a pond in a small village constructed by the Municipality. The court has held that the State was vicariously liable to pay compensation.

The Government (Liability in Tort) Bill, 1967: In view of uncertainty as to State liability, due to lack of proper legislation, the Law Commission recommended the legislation enshrining various provisions relating to State liability. Consequently a bill entitled "The Government (Liability in Tort) Bill, 1967 was introduced in Lok Sabha in 1969. But, it has not yet been passed into law.

2. CONTRACTUAL LIABILITY OF THE STATE (ARTICLE 299)

Article 299 of the Indian Constitution lays down the provisions relating Contracts entered into by the Union or State Government with other party/parties, who may be an individual/two or more individuals or a firm or company, who can legally enter into a valid contract as per Section 10 of the Indian Contract Act, 1872. Article 299 runs as follows–

(1) All contracts made in the exercise of the executive power of the Union or of a State shall be expressed to be made by the President, or by the Governor of the State, as the case may be, and all such contracts and all assurances of property made in the exercise of that power shall be executed on behalf of the President or the Governor by such persons and in such manner as he may direct or authorize.

(2) Neither the President nor the Governor shall be personally liable in respect of any contract or assurance made or executed for the purposes of this Constitution, or for the purposes of any enactment relating to the Government of India heretofore in force, nor shall any person making or executing any such contract or assurance on behalf of any of them be personally liable in respect thereof.

The word 'Contract' is derived from the Lain term "Contractum", which means 'drawn together'. It is an agreement entered into between two or more parties subject to certain terms and conditions. In a contract, there are two parties. Each party has to fulfill his/her obligation. Otherwise, it amounts to breach of contract causing loss or damage to the other party, who can sue for enforcement of the contract. A contract to be enforceable in a Court of Law, it must be a valid contract. According to Section 10 of the Indian Contract Act, a contract is said to be valid, when two or more competent persons (Sec.11) freely consented (Sec.14) to enter into an agreement not declared void (Sec.25) or opposed to public policy (Secs.26 to 30) for a lawful consideration (Sec.2(d)). In other words, a contract, which satisfies the elements of a valid contract namely, capacity or competence of parties, free consent lawful consideration etc. is said to be a valid contract and is enforceable. How the individuals enter into contracts, the State (Union or State Government) can enter into contracts with other individuals/agencies/bodies/ authorities through its servants.

A modern welfare State is shouldered with the responsibility of implementing various schemes for the welfare of its citizens. In this connection, the State/Government enters into variety of contracts with the individuals and other agencies. In such situations, state as a party to the contract, is subject to the same contractual obligations, rights and liabilities. However, the State in implementation of the welfare measures, deserves certain privileges and immunities.

Government Contract: A contract entered into with/by the Government/State must fulfill the essentials of a valid contract under Section 10 of the Indian Contract Act, 1872, and also the conditions/provisions enshrined under Article 299(1) of the Indian Constitution. Therefore, a Government contract to be valid the following conditions are to be satisfied:

1. Essentials of a valid contract under Section 10 of the Indian Contract Act, 1872; and

2. The provisions under Article 299(1) of the Indian Constitution.

Article 298 of the Indian Constitution empowers the Union of India and States to carry on any trade or business by entering into contracts through its executive power.

Historical Background: In England– In England, the Crown (State/Government) enjoyed immunity (exemption) from liability on the ground of a well known maxim 'The king can do no wrong'. However, such immunity was never enjoyed by the Crown in respect of Contractual Liability.

In ***Bank of Bengal v. The United Company,*** **(1831)**– The Government (East India Company) was held liable for the contractual liability.

But the Government/State was held not liable for contractual liability on the ground of Sovereign Power in ***Nobin Chunder v. Secretary of State*** **(1875)– In England**, the Crown Proceedings Act, 1947, abolished sovereign immunity and held the Government liable like an employer or an ordinary individual. **In India**, according to Section 79 of the Civil Procedure Code, 1883, the Government is liable in contract like a private individual.

Constitutional Provisions: Article 298 of the Constitution empowers the Government (Union of India and the States) to carry on any trade or business by entering into contracts through its executive power.

Article 299(1) lays down the procedure for entering into contracts by/with the Government. Accordingly, the contract with/by the Government to be valid, the following conditions are to be satisfied:

1. The contract must be expressed to be made by the President or the Governor as the case may be.
2. Such contract must be executed by the person authorised by the President or Governor as the case may be.

3. The contract must be executed on behalf of the President or the Governor as the case may be.

Earlier, the above rules were strictly followed to safeguard the interests of the Government. In course of time, strict adherence to the above conditions became impracticable. In the interests of the parties contracted with the Government, Courts liberalized the strict compliance of the above rules. However, the Government contract must be in writing and the oral contract is not enforceable.

The Government contract to be valid, no formal agreement is essential. Relevant case on this point is:

***Union of India v. A.L. Rullia Ram* (AIR 1963 SC 1685)–** The defendant Government servant, the Chief Director of Purchase issued tenders for purchase of certain quantity of cigarettes and the plaintiff's tender (quotation) was accepted and signed by the Chief Director. But, no formal agreement was entered into for the purchase. The plaintiff sued the Government for specific performance, of the contract. The defendant (Government) contended that the contract was not enforceable since there was no formal agreement. The Supreme Court denied this contention and held in favour of the plaintiff that the contract is enforceable.

In ***Steel Authority of India Ltd. V. State of M.P* (AIR 1999 SC 1630)–** it has been held that Article 299 applies to the contracts to be executed in the exercise of the executive power and not to those executed by virtue of statutory power.

1. The contract must be in the name of the President or Governor: The Government contract to be valid and binding, it must be made in the name of the Governor in case a contract by the State and the President in case of a contract by the Union of India.

2, Person Authorized: The Government contract to be valid, it must have been entered into by the person so authorized by the President or Governor as the case may be. Such authority may be

expressed or implied. A contract under an implied authority is valid and enforceable as in the case of

Bhikraj Jaipuria v. Union of India **(AIR 1962 SC 113)**– A contract for supply of large quantity of food grains was entered into between the plaintiff and the defendant Government's servant, the Divisional Superintendent, Eastern Railways. But there was no express authority to the Divisional Superintendent to enter into such contract. The plaintiff supplied the food grains and the same was distributed to the employees, and a part of the amount also was paid. In an action for payment of the balance, the defendant Government was held liable, on the ground that the Divisional Superintendent had an implied authority to enter into the contract.

3. On behalf of the President or the Governor: The Government contract to be valid, it must have been entered into by the person so authorized on behalf of the President or Governor as the case may be and it must be made in the name of the President or Governor as the case may be. Otherwise, it is not valid.

Karamshi v. Bombay **(AIR 1964 SC 1714)**– In this case, an agreement for supply of canal water for irrigation purposes was entered into between the plaintiff and the P.W.D. Minister, through some letters. But, there was no formal agreement to that effect i.e., in the name of the Governor. The Supreme Court held the contract void, and not enforceable.

This view was followed in ***D.G.Factory v. State of Rajasthan*** **(AIR 1971 SC 141)** and ***Punjab v. O.P.B. Krishnan*** **(AIR 1988 SC 2149).**

Article 299(1): Mandatory and no Ratification: For the validity and enforceability of a contract entered into with/by the Government, the provisions of Article 299(1) of the Constitution are to be strictly complied with and are mandatory. Any contract, violating these provisions is defective, and cannot be ratified by the Government (as laid down in ***Mulchand v. State of Madhya Pradesh***).

In ***Mulchand v. State of Madhya Pradesh*** **(AIR 1968 SC 1218)**– it has been observed that for the validity and enforceability of a contract entered into with/by the Government, the provisions of Article 299(1) of the Constitution are to be strictly complied with and are mandatory. Any contract, violating these provisions is defective, and cannot be ratified by the Government.

Article 299(1) and Section 65 of the Contract Act: If the agreement with the Government is void as the requirements of Article 299(1) have not been complied, the party receiving the advantage under such agreement is bound to restore it or to make compensation for it to the person from whom he has received it. In ***State of Orissa v. Rajballabh Mitra*** **(AIR 1976 Orissa 19)**– it has been held that if a contractor enters into agreement with the Government for the construction of a godown and received payment therefor and the agreement is found to be void as the requirements of Article 299(1) have not been complied with, the Government can recover the amount advanced to the contractor under Section 65 of the Contract Act, 1872 which provides that when an agreement is discovered to be void, any person who has received any advantage under such agreement or contract is bound to restore it to make compensation for it to the person from whom he received it.

No personal liability to the Governor/President (Article 299(2)): Article 299(2) protects the President and Governor from personal liability arising out of such contracts.

Lecture - VII

Freedom of Trade, Commerce and Intercourse (Part XIII: Articles 301-307)

Part-XIII containing Articles 301 to 307 of the Indian Constitution lays down the provisions relating to the "Freedom of trade, commerce and intercourse within the territory of India". Article 301 provides for the freedom of trade, commerce and intercourse within the territory of India. Article 302 confers on the Parliament, power to impose certain restrictions on the trade, commerce and intercourse. Article 303 imposes certain restrictions on the legislative (law making) power on the Union and States with regard to trade and commerce. In other words, the Parliament and the State legislatures under delegated authority/legislation are empowered to pass laws relating to the trade and commerce subject to the provisions of Article 304 deals with restrictions on trade, commerce and intercourse among the States. Article 305 provides for saving of existing laws and laws providing for State monopolies. Article 306, which dealt with the power of certain States in Part-B of the First Schedule to impose restrictions on trade and commerce, was repealed by the Constitution (Seventh Amendment) Act, 1956, Section 29 and Schedule (w.e.f. 01-11-1956). Finally Article 307 confers on the Parliament, power to appoint authority for carrying out the purposes of Articles 301 to 304.

Article 301 declares that "trade, commerce and intercourse through the territory of India shall be free." However, the freedom conferred under Article 301 is not absolute and is subject to the restrictions under Articles 302 and 305 as stated hereunder:

a) non-discriminatory restrictions imposed by Parliament for the public interest (Articles 302, 303(1)).

b) discriminatory or preferential legislation by Parliament for the purpose of dealing with scarcity of goods in any part of India (Article 303(2)).

c) reasonable restrictions imposed by the Legislature of a State in the public interest (Article 304(b)).

d) non-discriminatory taxes imposed by the Legislature of a State on goods imported from States (Article 304 (a), and

e) restrictions imposed by existing laws continued in force (Article 305).

Trade, Commerce and Intercourse: The term 'trade' means buying and selling of goods. It also includes other activities which may be regarded as integral part of the transaction of buying and selling, such as the transport of goods or merchandise from one place to another, the interchange or exchange of commodities.

The word 'commerce' is wider than 'trade'. It includes all forms of transportation such as by land, air or water. Technically, it also means buying and selling of goods. But, what is essential for 'commerce' is transmission and not the profit-making as is there in 'trade'. It includes transportation of not only goods but also men or animals.

The expression 'intercourse' refers to commercial intercourse, which means "movement of goods from one place to another". In its wider sense, it includes not merely trade and commerce, but also activities, such as, movement of persons for the purpose of friendly association with one another.

The word 'free' in Article 301 does not mean freedom from laws or regulations. There is a clear distinction between laws interfering with freedom to carry out the activities constituting trade and law imposing rules of proper conduct or other restrains for the due and orderly manner of carrying out the activities. The distinction is known as regulations.

The term 'through-out the territory of India' has been interpreted so as to extend the freedom guaranteed by Article 301 to inter State as well as intra State trade.

It is to be noted that Article 19(1)(g) also guarantees to citizens the right to practice any profession or carry on any trade, business, etc. But while Article 19(1)(g) confers a fundamental right on citizens to carry on trade, business etc. Article 301 confers only a statutory right. The right under Article 19(1)(g) can only be claimed by citizens, but the right under Article 301 can be claimed by any one.

The freedom guaranteed by Article 301 is freedom from all barriers, restrictions, control and regulation save only those expressly permitted by the other Article contained in Part XIII. The freedom of trade, commerce and intercourse throughout the territory of India is not absolute. Articles 302 to 305 of Part XIII make provisions with respect to the restrictions on this freedom.

In enacting the provisions of Part XIII, the Constitution makers seem to have kept in mind three main considerations, namely–

i) that in the large interests of India, there must be free flow of trade and commerce both inter State and intra State (within State);

ii) at the same time, State or regional interests must not altogether be ignored; and

iii) there must be power of intervention by the union in cases of crises for dealing with particular problems arising in any part of India.

In ***Atiabari Tea Co. Ltd. V. State of Assam*** **(AIR 1961 SC 232)** - the Assam Legislature passed the Assam Taxation (on goods carried by Roads or inland waterways) Act, 1954 to levy taxes on certain goods carried by road or inland waterways in the State of Assam. The appellants were the growers of tea and used to carry their tea to the market in Calcutta through the territory of Assam by road or inland waterways from Assam to Bengal. The tea carried by the appellants was subjected to the tax under the aforesaid Act. The Supreme Court held that the tax imposed on the goods directly restricted their transport or movement and therefore offended against Article 301. The Act was held void and the State was restrained from levying the tax. In determining the

scope of the freedom, the Court said, each case must be judged on its own facts and in its own setting of times and circumstances.

***Automobile Transport Ltd. V. State of Rajasthan* (AIR 1962 SC 1406)**– In the case, the validity of a tax levied under Section 4 of the Rajasthan Motor Vehicles Taxation Act, 1951, was challenged. This Section read with the schedules and Section 11, required the payment of tax in respect to motor vehicle (Rs.60/- on a motor car and Rs.2,000/- on a goods vehicle per year), used within the State in any public place or kept for use in the State. The Court ruled that the tax was not hit by Article 301 as it was a compensatory tax having been levied for the use of the roads provided for and maintained by the State.

Since the decision in Automobile Transport Ltd. Case, the concept of regulatory and compensatory taxes has become established and the Courts have liberalised the concept and allowed in subsequent cases such taxation at a higher rate.

In ***M/s. B.R. Enterprises v. State of U.P.*, AIR 1999 SC 1687,** the petitioners had challenged the validity of the Lotteries (Regulation) Act, 1998 passed by Parliament. The State of Uttar Pradesh had passed an order banning lotteries of other States by virtue of power entrusted under Section 5 of the impugned Act. It was contended that Section 5 of the Act and the U.P. Order was violative of Articles 301, 302 and 303 of the Constitution and hence invalid. The Supreme Court held that lotteries contain an element of chance and cannot, therefore, be trade and commerce as contemplated by Article 301 of the Constitution. This element of chance makes the lottery a gambling. Sale of lottery tickets organised even by the State could not be construed to be trade and commerce and even if it could be construed so, it cannot be raised to the status of "trade and commerce" as understood at common parlance or trade and commerce as used under Article 301. Hence, the Act is not violative of Articles 301 and 302 of the Constitution and is valid.

Lecture - VIII

Services under the Union and States (Part XIV: Articles 308-323)

Part-XIV of the Indian Constitution lays down the provisions relating to "Services under the Union and the States" i.e., Service conditions of the persons serving the Union or State Governments. Part-XIV consists of two chapters. Chapter-I, containing Articles 308 to 313, deals with "Services or Service Conditions of the Public/ Civil/Government Servants". Article 314, which dealt earlier with the provision for protection of existing officers of certain services was repealed by the Constitution (Twenty-eighth Amendment) Act, 1972, Section 3 (w.e.f. 29-08-1972). Article 308 speaks about 'Interpretation', wherein, the expression State does not include the State of Jammu & Kashmir, unless the context, otherwise requires. Article 309 lays down the provisions relating to 'recruitment and conditions of service of persons serving the Union or a State'. Article 310 prescribes the tenure of service of the civil servants. Article 311 lays down the rules with regard to punishment/disciplinary action against the civil servants viz. dismissal, removal, reduction in rank of the civil servants. Article 312 deals with All India Services. Article 312.A confers on Parliament power to vary/change or revoke conditions of services of the officers of certain services and Article 313 deals with transitional provisions.

Chapter-II containing Articles 315 to 323, deals with the provisions relating to "Public Service Commissions." Article 315 provides for the establishment of Union Public Service Commission central level and State Public Service Commission for each State for recruitment of civil/public servants Article 316 empowers the President of India to appoint the Chairman and other members of the Union Public Service Commission and the Government of the State concerned to appoint the Chairman and other members of

the State Public Service Commission of the State concerned. Article 317 prescribes procedure for removal and suspensions of the members of the Service Commission. Article 318 empowers the President and Governor of the State concerned to determine the number of members of the Commission of the Union and State respectively and prescribe the conditions of service. Article 319 prohibits members of the Service Commission (Union and State) from employment is Government of India or Government of a State and ceases to be a member of the Commission, if he/she holds further employment. Article 320 deals with functions of the Public Service Commission. Article 321 provides that Parliament or State legislature as the case may be, by law confer on Service Commissions to exercise additional functions and extend the same to any local authority or body corporate constituted by law in force. Article 322 provides for expenses of the Public Service Commission's viz. salaries, allowances pensions etc. of the members and staff are to be met from the Consolidated Fund of India. Finally Article 323 imposes on Public Service Commission's duty to submit the reports of work done annually to the President or Governor as the case may be.

Recruitment and Regulation of Conditions of Service (Article 309): Article 309 of the Indian Constitution lays down the rules with regard to "Recruitment and conditions of service in respect of the persons serving the Union or a State". It runs as follows–

Subject to the provisions of this Constitution, Acts of the appropriate Legislature may regulate the recruitment, and conditions of service of persons appointed, to public services and posts in connection with the affairs of the Union or of any State.

Provided that it shall be competent for the President or such persons as he may direct in the case of services and posts in connection with the affairs of the Union, and for the Governor of a State or such person as he may direct in the case of services

and posts in connection with the affairs of the State, to make rules regulating the recruitment, and the conditions of service of persons appointed, to such services and posts until provision in that behalf is made by or under an Act of the appropriate Legislature under this article, and any rules so made shall have effect subject to the provisions of any such Act.

It is to be noted that the rules laid down under Article 309 are constitutional, not like the rules made under the statute. Article 309 empowers Parliament and the State Legislatures to regulate the recruitment and the conditions of service of the persons appointed to public services and posts under the Union and the States, respectively. Until provision in that behalf is made by an appropriate legislature under Article 309, the President and the Governors may make rules for regulating the recruitment and conditions of service of persons appointed to such services and posts. The Constitution itself provides for the creation of the Public Service Commission for the Union and the States to assist in the recruitment of the Public Services. The President and the Governors can delegate their rule-making power under Article 309 to any other person or authority.

This lecture covers the following heads–

1. Tenure of Office or The Doctrine of Pleasure (Article 310).
2. Constitutional Safeguards (Article 311).
3. Compulsory Retirement, and
4. Public Service Commissions' (Articles 315-323).

1. TENURE OF OFFICE OR THE DOCTRINE OF PLEASURE (ARTICLE 310)

Position in England (Common Law): Article 310 of the Indian Constitution deals with "the Doctrine of Pleasure", which speaks about the tenure of office of the persons serving the Union

or State Government during the pleasure/at will of the Government. It runs as follows:–

(1) Except as expressly provided by this Constitution, every person who is a member of a defence service or of a civil service of the Union or of an all India service or holds any post connected with the defence or any civil post under the Union holds office during the pleasure of the President, and every person who is a member of a civil service of a State or holds any civil post under a State holds office during the pleasure of the Governor of the State.

(2) Notwithstanding that a person holding a civil post under the Union or a State holds office during the pleasure of the President or, as the case may be, of the Governor of the State, any contract under which a person, not being a member of a defence service or of an all India service or of a civil service of the Union or State, is appointed under this Constitution to hold such a post may, if the President or the Governor, as the case may be, deems it necessary in order to secure the services of a person having special qualifications, provide for the payment to him of compensation, if before the expiration of an agreed period that post is abolished or he is, for reasons not connected with any misconduct on his part, required to vacate that post.

The 'Doctrine of Pleasure' had its origin in Common Law in England. The expression 'Doctrine of Pleasure' is drawn from the Latin phrase '***durante bene placito***' which means "during pleasure". In England, a servant of the Crown holds office during the pleasure of the Crown. It connotes that the services of a Civil servant can be terminated at any time, at will, without assigning any reason.

However, the doctrine of pleasure under the Common Law is subject to one exception that it could be excluded by a Statute of Parliament.

Position in India: The Common Law 'Doctrine of Pleasure' was borrowed in India under the Government of India Act. In India,

the doctrine has been accepted and hence the civil servants hold office at the will/during the pleasure of the President of India in case of a servant of a Union Government and the Governor in respect of a servant under a State Government. However, certain safeguards have been provided for to protect the interests of the civil servants. Therefore, the power of the President or Governor is not unlimited.

Article 310(1) of the Indian Constitution provides that "Except as expressly provided by this Constitution, every person who is a member of a defence service or of a civil service of the Union or of an all-India service or holds any post connected with defence or any civil post under the Union holds office during the pleasure of the President and every person who is a member of a civil service of a State or holds any civil post under a State holds office during he pleasure of the President and every person who is a member of a civil service of a State or holds any civil post under a State holds office during the pleasure of the Governor of the State."

Restrictions or Limitations on the Doctrine of Pleasure: The doctrine of pleasure is subject to the following restrictions under the Indian Constitution.

1. The pleasure of the President or the Governor is controlled by provisions of Article 311.
2. The tenure of the Supreme Court Judges (Article 124), High Court Judges (Article 218), Auditor-General of India (Article 148(2)). The Chief Election Commissioner (Article 324), and the Chairman and Members of the Public Service Commission (Article 317) are not dependent on the pleasure of the President or the Governor, as the case may be. These posts are expressly excluded from the operation of the doctrine of pleasure.
3. The doctrine of pleasure is subject to the Fundamental Rights.

In ***Kameshwar Prasad v. State of Bihar,*** **(AIR 1962 SC 1166)** Rule 4A of the Bihar Government Servant's Conduct Rules, 1956, in so far as it prohibited any form of demonstration was struck down by the Supreme Court as being violative of the fundamental rights contained in Article 19(a) and (b) of the Constitution.

2. CONSTITUTIONAL SAFEGUARDS FOR CIVIL SERVANTS (ARTICLE 311)

Article 311 secures to the civil servants of the Government two procedural safeguards in relation to their tenure of office. These are—

1. No removal or dismissal by an authority subordinate to the appointing authority.
2. No removal or dismissal or reduction in rank except after an inquiry affording reasonable opportunity of hearing.

Who may claim these safeguards: Clause (1) of Article 311 provides that the following persons can claim the above safeguards:

i) Members of the civil services of the Union.

ii) Members of all-India services.

iii) Members of the civil services of the State.

iv) Persons holding Civil Posts under the Union or States.

Members of the defence services are thus excluded from the scope of Article 311. They cannot claim the protection of Article 311.

The expression 'Civil Post' is not defined in the Constitution. It means an appointment or office or employment on the Civil side of the administration.

In ***State of U.P. v. A.N. Singh*** **(AIR 1965 SC 360)** - the Supreme Court has held that a person holds a civil post if there exists a relationship of master and servant between the State and the person holding the post. The relationship is established if the

State has right to select the person holding the post. The relationship is established if the State has right to select and appoint the holder of the post, right to control the manner and method of his doing the work and the payment by it of his wages or remuneration. However, it has been held that the employees of statutory corporations or Government companies registered under the Companies Act are not civil servants.

1. No removal by subordinate authority: Article 311(1) says that a civil servant cannot be dismissed or removed by any authority subordinate to the authority by which he was appointed. This does not mean that the removal or dismissal must be by the same authority who made the appointment or by his direct superior. It is enough if the removing authority is of the same or co-ordinate rank as the appointing authority.

In ***Mysore SRT Corporation v. Marja Khasim*** **(AIR 1977 SC 747)**– it has been observed that if the order of dismissal or removal is made by an authority subordinate to the appointing authority, its unconstitutionality cannot be cured by confirming the order, on appeal, by the proper authority and the order will be unconstitutional and void, in spite of the fact that the order, on appeal, has been confirmed by the proper authority.

In ***P.V.Srinivasa Sastry v. Comptroller and Auditor General*** **(1993) 1 SCC 419)**– it has been observed that Article 311(1) does not provide that the departmental proceedings must be initiated only by the appointing authority. It is open to Union of India or a State Government to make any rule prescribing that the proceeding against any delinquent officer shall be initiated by an officer not subordinate to the appointing authority. Any such rule shall not be inconsistent with Article 311 because it will amount to providing an additional safeguard or protection to the holder of a civil post. In absence of a rule, any superior authority who can be held to be the controlling authority, can initiate such proceedings of dismissal of a civil servant.

In *Mahesh v. State of U.P.,* **(AIR 1955 SC 70)**– the person appointed by the Divisional Personnel Officer, E.I.R., was dismissed by the Superintendent, Power, E.I.R. The Court held the dismissal valid as both the officers were of the same rank.

2. Reasonable opportunity to defend: Article 311(2) lays down that a civil servant cannot be dismissed or removed or reduced in rank unless he has been given a reasonable opportunity to show cause against the action proposed to be taken against him. Originally, the opportunity to defend was given to a civil servant at two stages:

i) at the enquiry stage, and this is an accord with the rule of natural justice that no man should be condemned without hearing; and

ii) at the punishment stage, when as a result of enquiry the charges have been proved and any of the three punishments, i.e., dismissal, removal or reduction in rank were proposed to be taken against him.

The Constitution (42nd Amendment) Act, 1976 has abolished the right of the Government servant to make representation at the second stage of the inquiry. This second opportunity was given to the Government servants under the rulings of the Courts which was given a constitutional sanction by the Constitution (5th Amendment) Act, 1964. The newly added proviso to Article 311(2) by the (42nd Amendment) Act, 1976, makes it clear that if after inquiry it is proposed to impose upon a person any of the three punishments, i.e., dismissal, removal or reduction in rank, they may be imposed on the basis of the evidence given during such inquiry and he shall not be entitled to make any representation. This means that the above mentioned punishments will be imposed on the basis of the evidence adduced during the time of inquiry of charge against the Government servant. If as a result of such inquiry the charges are proved the same evidence shall be the basis of imposing the three penalties on the Government servant.

The protection under Article 311(2) is available only where dismissal, removal or reduction in rank is proposed to be inflicted by way of punishment and not otherwise. 'Dismissal' and 'Removal' are synonymous terms but in law they acquired technical meanings by long usage in Service Rules. There is, however, one distinction between the 'dismissal' and 'removal', that is, while in case of 'dismissal' a person is debarred from future employment, but in case of 'removal' he is not debarred from future employment.

Article 311(2) secures to a civil servant a 'reasonable opportunity' of being heard before he is dismissed or removed or reduced in rank. It has been observed that Article 311(2) incorporates the principle of natural justice that 'no man can be condemned unheard' (*audi alteram partem).*

However, it is settled that the provisions of the Evidence Act, Criminal Procedure Code or Civil Procedure Code do not apply to the departmental inquiries held under Article 311(2).

In ***Khem Chand v. Union of India,*** **(AIR 1958 SC 300)**– the Supreme Court summarised the scope of 'reasonable opportunity' envisaged to the Government servant by the provisions of Article 311(2). This case was decided prior to the Constitution 42nd Amendment, 1976, which excluded the reasonable opportunity of being heard against the punishment proposed to be inflicted after the inquiry into the charges was over.

The scope of 'reasonable opportunity' under the amended Clause (2) of Article 311 in the light of Khem Chand's ruling would be as follows:

a) The communication of charges to the delinquent servant;

b) Opportunity to deny the charges and to establish innocence;

c) Opportunity to defend himself, by cross-examining witness produced against him and examining other witnesses in his own support.

Exceptions to Article 311(2): The protection under Article 311(2) is not available in the following circumstances.

1. where a person is dismissed or reduced in rank on the ground of misconduct, which has led to conviction or criminal charges;
2. where it is impracticable to give the civil servant an opportunity to defend himself but the authority taking action against him shall record the reasons for such action;
3. where in the interest of the security of State, it is not expedient to give such an opportunity to the civil servant.

3. COMPULSORY RETIREMENT

It means "premature retirement of a Government servant in public interest." No element of punishment is involved in it and hence, the protection under Article 311 is not available to the Government Servant, retired compulsorily.

The purpose and object of premature or compulsory retirement of Government servant is to weed out the inefficient, corrupt, dishonest or dead-wood from the Government service.

An order of compulsory retirement does not cause any prejudice to the Government servant. He does not lose any of the terminal benefits, such as, salary, allowances, or proportionate pension, which he has already earned by past services. It, therefore, has no penal consequences.

In ***Shyam Lal v. State of U.P.,*** **(AIR 1954 SC 369)–** an officiating Superintending Engineer was compulsorily retired under Article 465(a) of the Civil Service Regulation. The Supreme Court held the order not a punishment and that Article 311(2) had no application.

In ***D. Ramaswami v. State of Tamil Nadu,*** **(AIR 1982 SC 793)–** the appellant, who started his career in 1953 as a Lower Division Clerk was promoted as an Asst. Commercial Tax Officer

in 1954, next as a Deputy Commercial Tax Officer in 1957, then as a Joint Commercial Tax Officer in 1962, as a Commercial Tax Officer in 1966 later as an Asst. Commissioner of Commercial Taxes in 1972 and then as a Deputy Commissioner of Commercial Taxes on 07-05-1975, as well as member of the State Tax Appellate Tribunal. He was compulsorily retired under F.R.56(d) on September 20, 1975. There was an adverse entry in his S.R. in 1969, based on which an inquiry was held and the Government dropped the charges made against him. However, it was subsequent to this inquiry that the appellant earned further promotions which reflected his good record of service. The Supreme Court held the compulsory retirement ordered shortly after such promotion as invalid and unsustainable.

Permanent and Temporary Government Servants: The protection under Article 311(2) is available to both permanent and temporary Government Servants.

In ***Purushottam Lal Dhingra v. Union of India* (AIR 1958 SC 36)–** the Supreme Court held that "Article 310 in terms, makes no distinction between permanent and temporary members of the service or between persons holding temporary or permanent post in the matter of their tenure being dependent upon the pleasure of President or the Governor, so does Article 311 in our view, makes no distinction between the two classes, both of which are, therefore within its protection and the decisions holding the contrary view cannot be supported as correct."

However, if a Government servant is holding a temporary post, termination after reasonable notice cannot entitle him to protection of the safeguards provided in Article 311(2) because he has no right to the post held by him. But, where the petitioner was promoted to a higher post and there was nothing to show that the initial promotion was on permanent basis and in view of this, reversion was violative of Article 311(2).

4. PUBLIC SERVICE COMMISSIONS (ARTICLES 315-323)

Chapter-II of Part-XIV of the Indian Constitution, containing Articles 315 to 323 lays down the provisions relating to Public Service Commissions. According to Article 315(1), there shall be a Public Service Commission for the Union and a Public Service Commission for each State. The former is known as Union Public Service Commission and the latter as State Public Service Commission. Two or more States may agree to have common Public Service Commission Article 315(2). The Union Public Service Commission, if requested by the Governor of State, may with the approval of the President, agree to act for a State.

Constitution of Public Service Commission (Articles 316 & 318): A Public Service Commission consists of a Chairman and a number of other members. The Constitution does not prescribe the number of members which a Commission shall consist of. Article 318, for that, provides that in case of Union Commission or a Joint-Commission, the President and in case of a State Commission, the Governor of the State, may, by regulations, determine the number of members of the Commission.

The appointment of the Chairman and other members of the Union Commission or a Joint Commission are made by the President while that of a State Commission by the Governor of the State.

Qualifications for Appointment: The Constitution does not prescribe any qualifications for the Chairman or other members of a Public Service Commission. However, Proviso to Clause (1) of Article 316 requires that a nearly as may be one-half of the members of every Public Service Commission shall be persons who at the dates of their appointment have held office for at least ten years either under the Government of India or under the Government of a State.

Tenure of Office: Clause (2) of Article 316 lays down that a member of the Union Public Service Commission holds office for a term of six years from the date on which he enters upon his office or until he attains the age of sixty-five years, whichever is earlier.

A member of a State Public Service Commission or a Joint Commission, hold office for a term of six years or until he attains the age of sixty-two years, whichever is earlier.

A member of a Public Service Commission may, by writing under his hand addressed, in the case of the Union Commission or a Joint Commission, to the President and in the case of State Commission, to the Governor of that State, resigns his office.

Functions of Public Service Commission (Article 320): Article 320 of the Constitution lays down the duties and functions of a Public Service Commission as stated below:

1. It is the duty of the Union and the State Public Service Commissions to conduct examinations for appointment to the services of the Union and the services of the State respectively.
2. It shall be the duty of the Union Public Service Commission if requested by two or more States to assist the States in framing and operating schemes of joint recruitment for any services for which candidates possessing special qualifications are required.
3. Clause (3) of Article 320 lays down many advisory functions of the Public Service Commission. It provides that the Union Public Service Commission or the State Public Service Commission, as the case may be, shall be consulted in the following matters:
   a) All matters relating to methods of recruitment to civil services and for civil posts.

The expression 'civil services and civil posts' means services and posts other than military. The expression though is wide enough but does not include posts or services for which the recruitment is made under specific provisions of the Constitution.

b) The principles to be followed in making appointments to civil services and posts and in making promotions and transfers from one service to another and on the suitability of candidate for such appointments, promotions or transfers.

c) All disciplinary matters affecting a person serving under the Government of India or the Government of a State in a civil capacity, including memorials or petitions relating to such matters.

d) Any claim by or in respect of a person who is serving or has served in Government service, in a civil capacity, that any costs incurred by him in defending legal proceedings instituted against him in respect of acts done or purported to be done in execution of his duty should be paid out of the Consolidated Fund of India or that of the State, as the case may be.

e) Any claim for the award of a pension in respect of injuries sustained by person while in a Government service, in a civil capacity, and any question as to the amount of any such award.

Lecture - IX

Elections
(Part-XV: Articles 324-329)

Part XV of the Constitution containing Articles 324-329-A lays down the provisions relating to 'Elections' (Article 329-A) was earlier inserted by the Constitution (Thirty ninth Amendment) Act, 1975, Section 4, w.e.f. 10-08-1975, which provided special provision as to elections to Parliament in case of Prime Minister and Speaker was repealed by the Constitution (Forty-fourth Amendment) Act, 1978, Section 36, w.e.f. 20-06-1979).

This lecture covers–

1. Election Commission (Article 324).
2. Multi Member Commission.
3. System of Adult Suffrage (Article 326).
4. Power of Parliament and State Legislatures with regard to Election Law (Articles 327 & 328) and
5. Settlement of Disputes.

1. ELECTION COMMISSION (ARTICLE 324)

Article 324 provides for Constitution of Election Commission conferring power to conduct elections to the members of the State and Central Legislatures (both houses of the Parliament). It runs as follows–

Superintendence, direction and control of elections to be vested in an Election Commission (Article 324): (1) The superintendence, direction and control of the preparation of the electoral rolls for, and the conduct of, all elections to Parliament and to the Legislature of every State and of elections to the offices

of President and Vice President held under this Constitution shall be vested in a Commission (referred to in this Constitution as the Election Commission).

(2) The Election Commission shall consist of the Chief Election Commissioner and such number of other Election Commissioners, if any, as the President may from time to time fix and the appointment of the Chief Election Commissioner and other Election Commissioners shall, subject to the provisions of any law made in that behalf by Parliament, be made by the President.

(3) When any other Election Commissioner is so appointed the Chief Election Commissioner shall act as the Chairman of the Election Commission.

(4) Before each general election to the House of the People and to the Legislative Assembly of each State, and before the first general election and thereafter before each biennial election to the Legislative Council of each State having such Council, the President may also appoint after consultation with the Election Commission such Regional Commissioners as he may consider necessary to assist the Election Commission in the performance of the functions conferred on the Commission by clause (1).

(5) Subject to the provisions of any law made by Parliament, the conditions of service and tenure of office of the Election Commissioners and the Regional Commissioners shall be such as the President may by rule determine.

Provided that the Chief Election Commissioner shall not be removed from his office except in like manner and on the like grounds as a judge of the Supreme Court and the conditions of service of the Chief Election Commissioner shall not be varied to his disadvantage after his appointment.

Provided further that any other Election Commissioner or a Regional Commissioner shall not be removed from office except on the recommendation of the Chief Election Commissioner.

(6) The President, or the Governor of a State, shall, when so requested by the Election Commission, make available to the Election Commission or to a Regional Commissioner such staff as may be necessary for the discharge of the functions conferred on the Election Commission by clause (1).

Article 324 of the Indian Constitution provides for the appointment of an Election Commission to superintend, direct and control elections. Election Commission is constituted/appointed under Article 324 of the Constitution. Like Judiciary (Supreme Court and High Courts), the Election Commission has been conferred autonomous and independent status, and is free from executive Interference.

Constitution: The Election Commission consists of the Chief Election Commissioner and such other number of election Commissioners as the President may fix from time to time. They are appointed by the President subject to law made by the Parliament (Article 324(2). The President may also appoint, in consultation with the Election Commission, Regional Commissioners as he considers necessary (to assist the Election Commission). The Chief Election Commissioner may be removed by impeachment as in the case of the Supreme Court Judge. The Election Commissioners and Regional Election Commissioners can be removed on the recommendation of the Chief Election Commissioner and other Commissioners.

2. MULTI MEMBER COMMISSION

On October 2, 1993 the Government of India issued an ordinance to convert one man Election Commission (headed by T.S. Seshan) into a multimember commission by appointing two persons as Election Commissioners. This ordinance restricted the supremacy of the Chief Election Commissioner, T.N. Seshan so as to remove the confrontation created by the controversial decisions by the Chief Election Commissioner. The decision to have

multimember commission has been postponed by the Supreme Court in:

S.S. Dhanoa v. Union of India **(AIR 1991 SC 1745)**– In this case, it was held that Election Commissioners cannot be treated on par with the Chief Election Commissioner.

In the exercise of the power under Article 324(2) in 1993, two Election Commissioners M.S.Gill and G.V.G.Krishna Murthy have been appointed and equated with the Chief Election Commissioner. The decisions are to be taken unanimously or by majority if there is no unanimity. T.N.Seshan, the Chief Election Commissioner was not in favour of it. On petition filed by T.N.Seshan, the Supreme Court made interim order upholding the supremacy of the Chief Election Commission.

In ***T.N.Seshan v. Union of India*** **(1995) 4 SCC 611)**– T.N.Seshan had challenged the validity of the Ordinance and the Act on the ground that it was arbitrary, unconstitutional and void. He also argued that the Ordinance and the Act are inconsistent with the scheme of Article 324 and did not give power to the Parliament to frame rules for transaction of business of Election Commission. It was pleaded by him that Section 10 of the Act which provides that the Election Commission will take decisions unanimously and if they differ in opinion on any matter, such matter shall be decided according to the opinion. He also alleged that because of his insistence on strict compliance with model Code of Conduct by all political parties and strict actions the ruling party at the Centre was unhappy with him therefore in order to curtail his powers the Act was enacted. The Five Judge Bench of the Supreme Court rejected Seshan's arguments and held that the Chief Election Commissioner does not enjoy a status superior to other Election Commissions. The Scheme of Article 324 clearly provides for a multi member body comprising the Chief Election Commissioner and the Election Commissioners. Although there are two differences between the service conditions of Chief

Election Commissioner and other Election Commissions, such as the Chief Election Commissioner can only be removed from his office in the like manner and on the like ground as a Judge of the Supreme Court and that conditions of service cannot be varied to the disadvantage of the Chief Election Commissioner after his appointment, while other Election Commissioners can be removed on the recommendation of the Chief Election Commissioner, but that is not an indication for conferring a higher status on Chief Election Commissioner. Article 324 envisages a permanent body to be headed by a permanent incumbent namely, the Chief Election Commissioner. Therefore in order to preserve and safeguard his independence he had to be treated differently because there cannot be an Election Commission without a Chief Election Commissioner.

It was observed that the Parliament was competent to enact Section 9 and 10 introduced by the amending Ordinance/Act and there was nothing in the scheme of Article 324 to include that the decision by majority would be an illegally.

The Election Commission being now a multi member body, if the Election Commissioners do not reach an unanimous decision in the matter of expressing their opinion on the issue referred to the Election Commission, it would be necessary for the Chief Election Commissioner to express his opinion on the doctrine of necessity. The Court's judgment has ended the controversy over the functioning of the Chief Election Commissioner *vis-à-vis* the Election Commissions and the Court has advised all of them that 'for the sake of the people and the country they would eschew their egos and work in a spirit of *camaraderie*.' It has been observed that 'nobody can be above the institution which he is supposed to serve. He is merely the creature of the institution, he can exist only if the institution exists. To project the individual as mightier than the institution would be grave injustice.'

Functions: The Election Commission performs the following functions (Article 324(1)):

1. To superintend, direct and control preparation of the electoral rolls.
2. To conduct Elections to Parliament, State Legislatures and to the offices of the President and Vice-President.
3. Elections to the office of President and Vice President.
4. Appointment of Election Tribunals.
5. As per clause (b) of Article 324, the President and the Governor shall make available to the Election Commission on its request such staff as may be necessary for the functioning of Election Commission.

In ***Union of India v. Association for Democratic Reforms*** **(AIR 2002 SC 2112)–** the Supreme Court has directed the Election Commission to ask the contesting candidates regarding the following five counts:

i) Whether the candidate has been or is convicted or acquitted or discharged of any criminal offence in the past, and if so, whether he has been punished with imprisonment or fine?

ii) Whether the candidate prior to six months of filing of nomination is accused in any pending case, of any offence punishable with imprisonment for two years or more, and which charges have been framed or cognisance taken by a court of law, and if so, details thereof.

iii) The assets, including immovable, movable and bank balance, among others, of a candidate and of his/her spouse and dependents.

iv) Liabilities, if any and particularly if there are any pending dues to any public financial institutions or (State or Central) Government.

v) Educational qualification of the candidate.

3. SYSTEM OF ADULT SUFFRAGE (ARTICLE 326)

Article 326 envisages that elections to the House of People (Lok Sabha) and Legislative Assemblies of the States to be held on the basis of adult suffrage. It reads as follows–

The elections to the House of the People and to the Legislative Assembly of every State shall be on the basis of adult suffrage; that is to say, every person who is a citizen of India and who is not less than (eighteen years) of age on such date as may be fixed in that behalf by or under any law made by the appropriate Legislature and is not otherwise disqualified under this Constitution or any law made by the appropriate Legislature on the ground of non residence, unsoundness of mind, crime or corrupt or illegal practice, shall be entitled to be registered as a voter at any such election.

Article 326 incorporates the system of adult suffrage for elections to the Lok Sabha and the Legislative Assembly of every State. According to this system, a person to be registered as a voter for these elections must comply with the following requirements.

i) He must be a citizen of India.

ii) He must not be less than 18 years of age on the appointed day. Prior to the Constitution (61st Amendment) Act, 1989, the age for registration as a voter was 21 years.

iii) He must not be otherwise disqualified under the Constitution or any law made by the appropriate Legislature on the ground of non-residence, unsoundness of mind, crime, corrupt or illegal practice.

Parliament has enacted the Representation of People Act, 1950 which requires a person, to be registered as a voter, to fulfill the following conditions:

i) He must be a citizen of India.

ii) He must not be declared to be of unsound mind by a competent court; and

iii) He must not be disqualified from voting under a law relating to corrupt and illegal practices or other offences in connection with elections.

No person is entitled to be registered in the electoral roll for more than one constituency, or of any constituency more than once. A person shall be disqualified from voting at any election for 6 years if he is convicted of any of the specified offences punishable with imprisonment or who upon the trial of an election petition is found guilty of any corrupt practice. This disqualification may, however, be removed by the Election Commission for reasons recorded by it in writing.

4. POWER OF PARLIAMENT AND STATE LEGISLATURE WITH REGARD TO ELECTION LAW (ARTICLES 327 & 328)

Article 327 empowers Parliament to make provisions with respect to all matters, relating to or in connection with election to Parliament and State Legislature, the preparation of electoral rolls, the delimitation of constituencies and all other connected matters. In exercise of the powers conferred by Article 327, Parliament has enacted the Representation of Peoples Act, 1950 and 1951; the Presidential and Vice-Presidential Elections Act, 1952; and the Delimitation Commission Act, 1952. Article 327 reads as follows–

Subject to the provisions of this Constitution, Parliament may from time to time by law make provision with respect to all matters relating to, or in connection with, elections to either House of Parliament or to the House or either House of the Legislature of a State including the preparation of electoral rolls, the delimitation of constituencies and all other matters necessary for securing the due constitution of such House or Houses.

Article 328 confers a similar power on State Legislatures. The State Legislature can make laws relating to all the above matters referred to under Article 327, in so far as provision in that behalf is not made by Parliament. It reads as follows–

Subject to the provisions of this Constitution and in so far as provision in that behalf is not made by Parliament, the Legislature of a State may from time to time by law make provision with respect to all matters relating to, or in connection with, the elections to the House or either House of the Legislature of the State including the preparation of electoral rolls and all other matters necessary for securing the due constitution of such House or Houses.

5. SETTLEMENT OF ELECTION DISPUTES (ARTICLE 329)

Article 329 deals with "Bar to interference by courts in electoral matters". It reads as follows–

a) The validity of any law relating to the delimitation of constituencies or the allotment of seats to such constituencies, made or purporting to be made under Article 327 or Article 328, shall not be called in question in any court.

b) No election to either House of Parliament or to the House or either House of the Legislature of a State shall be called in question except by an election petition presented to such authority and in such manner as may be provided for by or under any law made by the appropriate Legislature.

Article 329 says that the validity of law relating to the delimitation of constituencies or the allotment of seats to such constituencies shall not be called in question in any court. Clause (b) of Article 329 provides that elections can only be called in question by an election petition presented to such authority and in such manner as may be laid down by law made by the appropriate legislation. In exercise of the powers under Clause (b) of this

Article Parliament enacted the Representation of Peoples Act, 1951. Under this Act, the decision of the Election Commission was final.

In ***Ponnu Swami v. Returning Officer (Namakal,* AIR 1962 SC 64)**– The appellant's nomination paper for the State Assembly was rejected by the Returning Officer. He then moved the High Court under Article 226 to quash the order of the Returning Officer and to direct the inclusion of his name in the list of valid nominations. The High Court dismissed the writ-petition on the ground that under Article 329(b) the Court had no jurisdiction to interfere with the order of the Returning Officer. The appellant went in appeal to Supreme Court. The Supreme Court held that the word 'election' in Article 329 connotes the entire procedure to be gone through to return the candidate to the legislature, and bars the jurisdiction of the High Court under Article 226 as well. Acceptance or rejection of nomination paper is included in the term 'election'. The matter can only be challenged by the election-petition before the High Court after the election is over.

In ***K.Venkatachalam v. A.Swamickan* (AIR 1999 SC 1723)**– it has been held that bar of Article 329(b) will not come into play with a case which falls under Articles 191 and 193 which provides for disqualification of membership and penalty for sitting and voting when disqualified and the whole of election process is over. It has been further held that the High Court can declare under Article 226 that the election was illegal inasmuch as elector did not possess basic constitutional and statutory qualification.

The Constitution (19th Amendment) Act, 1966, abolished the jurisdiction of Election Tribunals over election disputes. The Amendment has vested this power in the High Courts. The effect of vesting the power in the High Courts was to expedite decision in election disputes.

Lecture - X

Emergency Provisions (Part-XVIII: Articles– 352-360)

The word 'Emergency' literally means "exigency or Pressing necessity". Part XVIII containing Articles 352 to 360 of the Indian Constitution provide for "Emergency Provisions". Article 352 confers on the President, Power to issue proclamation of emergency on different grounds. Article 353 speaks about the effect of the proclamation of emergency. Article 354 deals with "Application of provisions relating to distribution of revenues, while proclamation of emergency is in operation. Article 355 imposes on the Union to protect every State against external aggression and internal disturbance. Article 356 deals with "President Rules". It lays down provisions in case of failure of constitutional machinery in States. Article 357 confers on Parliament to exercise legislative powers of the State legislature during proclamation of emergency in that State under Article 356. Article 358 provides for "Suspension of provisions of Article 19 during emergencies. Article 359.A, which was inserted earlier by the Constitution (Fifty-ninth Amendment) Act, 1988, Section 3 (w.e.f. 30-03-1988) has been repealed by the Constitution (Sixty-third Amendment), Act, 1989 deal with "Application of this part to the State of Punjab. Finally, Article 360 lays down the "Provisions as to Financial Emergency". The proclamation of emergency is categorized under the following heads.

1. National Emergency (Article 352).
2. State Emergency (Article 356); and
3. Financial Emergency (Article 360).

1. NATIONAL EMERGENCY (ARTICLE 352)

Emergency arising from a threat to the security of India is called 'National Emergency.' Article 352 of the Constitution provides for National Emergency. If the President is satisfied that a grave emergency exists, whereby the security of India or any part of India is threatened either by war or external aggression or armed rebellion, he may make a Proclamation of Emergency in respect of whole of India or any part thereof. Article 352 runs as follows–

(1) If the President is satisfied that a grave emergency exists whereby the security of India or of any part of the territory thereof is threatened, whether by war or external aggression or (armed rebellion) he may, by Proclamation, make a declaration to that effect (in respect of the whole of India or of such part of the territory thereof as may be specified in the Proclamation).

Explanation:- A Proclamation of Emergency declaring that the security of India or any part of the territory thereof is threatened by war or by external aggression or by armed rebellion may be made before the actual occurrence of war or of any such aggression or rebellion, if the President is satisfied that there is imminent danger thereof.

(2) A Proclamation issued under clause (1) may be varied or revoked by a subsequent Proclamation.

(3) The President shall not issue a Proclamation under clause (1) or a Proclamation varying such Proclamation unless the decision of the Union Cabinet (that is to say, the Council consisting of the Prime Minister and other Ministers of Cabinet rank appointed under Article 75) that such a Proclamation may be issued has been communicated to him in writing.

(4) Every Proclamation issued under this Article shall be laid before each House of Parliament and shall, except where it is a Proclamation revoking a previous Proclamation, cease to operate

at the expiration of one month unless before the expiration of that period it has been approved by resolutions of both Houses of Parliament.

Provided that if any such Proclamation (not being a Proclamation revoking a previous Proclamation) is issued at a time when the House of the People has been dissolved, or the dissolution of the House of the People takes place during the period of one month referred to in this clause, and if a resolution approving the Proclamation has been passed by the Council of States, but no resolution with respect to such Proclamation has been passed by the House of the People before the expiration of that period, the Proclamation shall cease to operate at the expiration of thirty days from the date on which the House of the People first sits after its reconstitution, unless before the expiration of the said period of thirty days a resolution approving the Proclamation has been also passed by the House of the People.

(5) A Proclamation so approved shall, unless revoked, cease to operate on the expiration of a period of six months from the date of the passing of the second of the resolutions approving the proclamation under clause (4).

Provided that if and so often as a resolution approving the continuance in force of such a Proclamation is passed by both Houses of Parliament the Proclamation shall, unless revoked, continue in force for a further period of six months from the date on which it would otherwise have ceased to operate under this clause.

Provided further that if the dissolution of the House of the People takes place during any such period of six months and a resolution approving the continuance in force of such Proclamation has been passed by the Council of States but no resolution with respect to the continuance in force of such Proclamation has been passed by the House of the People during the said period, the

Proclamation shall cease to operate at the expiration of thirty days from the date on which the House of the People first sits after its reconstitution unless before the expiration of the said period of thirty days, a resolution approving the continuance in force of the Proclamation has been also passed by the House of the People.

(6) For the purposes of clauses (4) and (5), a resolution may be passed by either House of Parliament only by a majority of the total membership of that House and by a majority of not less than two-thirds of the members of that House present and voting.

(7) Notwithstanding anything contained in the foregoing clauses, the President shall revoke a Proclamation issued under clause (1) or Proclamation varying such Proclamation if the House of the People passes a resolution disapproving, or, as the case may be, disapproving the continuance in force of, such Proclamation.

(8) Where a notice in writing signed by not less than one-tenth of the total number of members of the House of the People has been given, of their intention to move a resolution or disapproving, or, as the case may be, for disapproving the continuance in force of, a Proclamation issued under clause (1) or a Proclamation varying such Proclamation–

a) To the Speaker, if the House is in session; or

b) To the President, if the House is not in session.

A specific setting of the House shall be held within fourteen days from the date on which such notice is received by the Speaker, or, as the case may be, by the President, for the purpose of considering such resolution.

(9) The power conferred on the President by this Article shall include the power to issue different Proclamations on different grounds, being war or external aggression or (armed rebellion), whether or not there is a Proclamation already issued by the President under clause (1) and such Proclamation is in operation.

Constitutionally speaking, the expression 'Proclamation of Emergency' refers only to proclamation made under Clause (1) of Article 352. Therefore, the expression 'Proclamation of Emergency' or the term 'Emergency' whenever, used, should not include the situations provided for under Articles 356 and 360.

Article 352 does not prescribe any particular mode in which a Proclamation of Emergency should be published in order to come into operation. Therefore, the Proclamation may be published in such manner as the authority issuing the proclamation would deem fit in order to make it known to the public.

For a proclamation of emergency under Article 352, the actual occurrence of war, aggression or armed rebellion is not necessary. A proclamation may be made if there is imminent danger of war etc.

Grounds for Proclamation of Emergency: Prior to the 44th Amendment, Article 352(1) provided that the President could make a Proclamation declaring Emergency on any of the following three grounds:

1. War
2. External Aggression, or
3. Internal Disturbance.

The expression 'internal disturbance' is too vague and wide. It may cover a minor disturbance of law and order or even a political agitation.

After 44th Amendment, a Proclamation of Emergency may be issued on any of the following grounds:

a) War;
b) External Aggression; or
c) Armed rebellion.

a) **War:** The term War may mean the existence of violent struggle between two countries through the application of armed forces. When there is formal declaration of an attack from one country against another, there exists 'War' between them.

b) **External Aggression:** The expression 'external aggression' has wide meanings. It covers unilateral attacks with force by one State against another State without formal declaration of war. Such unilateral acts of force by one State against another State, so long as, they are not answered by similar hostile acts by the other side, constitute external aggression.

c) **Armed Rebellion:** Prior to the 44th Amendment, 1978 one of the grounds on which emergency could be declared under Article 352(1) was 'internal disturbance'. These words 'internal disturbance' were vague and gave wide discretion to the Executive to declare emergency even on flimsy grounds. The 44th Amendment has now substituted the words 'armed rebellion' for the words 'internal disturbance' which will exclude the possibility of a situation of proclamation of emergency by political reasons or otherwise. Article 352 attracts for Proclamation of emergency when there is internal disturbance caused by 'armed rebellion' only.

Article 352 does not prescribe any particular mode in which a Proclamation of Emergency should be published in order to come into operation. Therefore, the Proclamation may be published in such manner as the authority issuing the Proclamation would deem fit in order to make it known to the public.

The proclamation of Emergency must be laid before each House of Parliament and it shall cease to be in operation at the expiration of one month unless before the expiration of that period it has been approved by resolutions of both Houses of Parliament.

In case the Proclamation is issued at a time when the Lok Sabha has been dissolved or dissolution takes place during the

period of one month referred to above, without approving the proclamation, but the proclamation has been approved by the Rajya Sabha, it shall cease to operate at the expiration of 30 days from the date on which the Lok Sabha sits after fresh election, unless before the expiry of above period of 30 days, a resolution approving the proclamation has been passed by the Lok Sabha.

The Proclamation so approved shall remain in force for a period of six months from the date of the approval. For further continuance of the Emergency beyond the period of six months, according to 44th Amendment Act, 1978, approval of Parliament will again be required.

A resolution approving the Proclamation must be passed by special majority, that is by a majority of the total members of each House and also by a majority of not less than two thirds of the members present and voting in each House. Prior to the 44th Amendment Act, 1978, such resolution could be passed by Parliament by a simple majority.

The President shall revoke a Proclamation of Emergency or a Proclamation varying such Proclamation if the Lok Sabha passes a resolution disapproving it or disapproving its continuance. Where a notice in writing signed by not less than 1/10th of the total number of members of the Lok Sabha have been given their intention to move a resolution for disapproving the continuance of a proclamation of Emergency–

a) To the speaker, if the House is in session; or

b) To the President, if the House is not in session; a special sitting of the Lok Sabha shall be held within 14 days from the date on which such a notice is received by the speaker or the President for the purpose of considering the resolution.

The first Proclamation of Emergency was issued under Article on October 26, 1962 on the ground of external

aggression i.e. the aggression by China in the NEFA. It was revoked on January 10, 1968. Again on December 3, 1971 the Emergency was Proclaimed on the ground of external aggression i.e. aggression by Pakistan. While the Proclamation of Emergency issued in 1971 (which was revoked on 27-03-1977), was in operation, another Proclamation of Emergency was issued on 25th June, 1975 on the ground of internal disturbance. Both the Houses adopted the resolution approving the Proclamation of Emergency.

In 1975, the national emergency was declared on the ground of internal disturbance under Article 352 (1) by the then Prime Minister Indira Gandhi because the opposition parties had given a call to launch a movement with a view to compelling her to resign from the post of Prime Minister as her election to the Lok Sabha was declared void by the Allahabad High Court. Later the 44th Amendment in 1978 has substituted the words 'armed rebellion' for the words 'internal disturbance' with a view not to use the provision for political ends.

In ***Baburao v. Union*** **(AIR 1988 SC 440)**– it has been held that there is no Rule which requires the resolution of the House of Parliament approving the Proclamation of Emergency should be published in the Official Gazette. Non publication of the resolution in the Official Gazette would not make it ineffective.

In ***Waman Rao v Union*** **(AIR 1981 SC 271)**– the validity of the 40th and 42nd Amendments had been questioned. It has been observed that "Thus, in the first place, we are not disposed to decide the question as to whether the issuance of a proclamation of emergency raises a justiciable issue. Secondly, assuming it does, it is not possible in the present state of record to answer that issue one way or the other. And, lastly, whether there was justification for continuing the state of emergency after the cessation of hostilities with Pakistan is a matter on which we find ourselves ill equipped."

The Court concluded that the two Acts by which the duration of Lok Sabha was extended are valid and lawful. The 40th and 42nd constitutional Amendments cannot be struck down on the ground that they were passed by Lok Sabha which was not lawful in existence.

The 42nd Amendment Act, 1976 made the proclamation of Emergency by the President immune from judicial review–

In ***Minerva Mills v. Union of India*** **(AIR 1980 SC 1789)** Bhagwati J has held that there is no bar to judicial review of the validity of a Proclamation of Emergency issued by the President under Article 352 (1). Merely because a question has a political complexion, it is no ground why the court should shrink from performing its duty under the Constitution if it raises an issue of Constitutional determination. However, the 44th Amendment Act, 1978 removed the fetter of the immunity from judicial review, so that the constitutionality of the Proclamation can be questioned in a court on the ground of *mala fides.*

Regarding the duty of the union to protect States against external aggression and internal disturbance. Article 355 of the Constitution of India provides that it shall be the duty of the Union to protect every State against external aggression and internal disturbance and to ensure that the Government of every State is carried on in accordance with the provisions of this constitution.

Effects: Following are the consequences of the proclamation of Emergency:

1. **Suspension of Fundamental Rights:** The immediate effect of the proclamation of emergency is, suspension of Fundamental Rights guaranteed under Article 19 of the Constitution. The President under Articles 158 and 359 can suspend further, other fundamental rights except Articles 20 and 21 of the Constitution.

In ***A.D.M. Jabalpur v. Sukla,*** (Popularly known as Habeas Corpus Case), **AIR 1976 SC 1207–** The Supreme Court held that, when the right to enforce fundamental rights is suspended under Article 359, a writ of habeas corpus for the enforcement of Fundamental Right under Article 21 is not maintainable.

However, it no longer holds good after the 44th Amendment. In other words, Articles 20 and 21 are exempted from suspension under Article 359.

2. **Extension of Centre's Executive Power (Article 353):** It empowers the Union (Centre) to extend its executive power by giving certain directions to the State.

   The 42nd Amendment made a consequential change in Article 353 following the amendment made in Article 352. It provides that the executive power of the Union to give directions under Clause (a) and the power to make laws under Clause (b) shall also extend to any State other than the State where emergency is in force, if the security of India or any part of the territory is threatened by activities in or in relation to that part of the territory of India in which the Proclamation of Emergency is in operation.

3. **Parliament, legislate on State subjects (Article 353(b):** The Union Parliament is empowered to make laws in respect of the matters in State list. The law-making power of the State is not suspended during the emergency. The State can make law but it is subject to the overriding power of the Union Parliament.

4. **Extension of the life of Lok Sabha (Article 83(2)):** The duration of Lok Sabha is five years. The President under Article 83(2) of the Constitution can extend the life/term of Lok Sabha by one year. He can extend each time up to 6 months during the period of emergency.

2. STATE EMERGENCY OR FAILURE OF CONSTITUTIONAL MACHINERY OR PRESIDENT'S RULE IN STATES (ARTICLE 356)

Article 356 of the Indian Constitution empowers the President of India to impose 'President's Rule' in the States in the event, failure of constitutional machinery in a State. It contains the provisions in case of failure of constitutional machinery in states. It runs as follows:

Where any State has failed to comply with, or to give effect to any directions given in the exercise of the executive power of the Union under any of the provisions of this Constitution, it shall be lawful for the President to hold that a situation has arisen in which the Government of the State cannot be carried on in accordance with the provisions of this Constitution.

The true meaning of the term 'failure of the Constitutional machinery' was not given by the Constituent Assembly. The study team of the Administrative Reforms Commission commented that what constitutes a failure of the Constitutional machinery and calls for the use of this Article has not been and will not be authoritatively defined. This has resulted in Governors giving the Article that meaning which they felt convenient and suited their design.

The Sarkaria Commission pointed out that the phrase is capable of both a wider and narrower construction. In a wider sense it comprehends each and every infringement of any provision of the Constitution. Narrowly it means no more than actual failure or breakdown of the constitutional machinery in the State to destroy the constitutional equilibrium between the Union and the States. According to H.M Seervai (in his Constitutional Law of India Volume-II p.2625 (3rd Ed.). 'It will enable the Union

executive to cut at the root of the democratic Parliamentary form of the Government in the States.'

Based on the report of the Sarkaria Commission and the approval of the Court in ***S.R.Bommai v. Union of India*** **(1994) 3 SCC 1)** Dr. Durgadas Basu (in his 'Introduction to the Constitution of India' (P.365) 20th Ed.) listed the situations which do not amount to 'failure of constitutional machinery as given below.

1. A situation of maladministration in a State, where a duly constituted ministry enjoys support of the Assembly.
2. Where a Ministry resigns or is dismissed on losing majority support and the Governor recommends imposition of President's Rule without exploring the possibility of installing an alternative government.
3. Where a Ministry has not been defeated on the floor of the House, the Governor on his subjective assessment recommends suppression and imposition of President's Rule.
4. Where in general elections to the Lok Sabha the ruling party in the State has suffered a massive defeat.
5. Where there is situation of internal disturbance but all possible measures to contain the situation by the Union in discharge of its duty, under Article 355, have not been exhausted.
6. Where no prior warning or opportunity is given to the State Government to correct itself in cases where directives were issued under Articles 256 and 257 etc.
7. Where the power is used to sort out intra party problems of the ruling party.
8. The power cannot be legitimately exercised on the sole ground of stringent financial exigencies of the State.
9. The power cannot be invoked merely on the ground that there are serious allegations of corruption against the Ministry.

10. Exercise of the power for a purpose extraneous or irrelevant to those which are permitted by the Constitution would be vitiated by legal *mala fides*.

When once a Proclamation is made by the President under Article 356(1), the President assumes himself the executive power of the State. The Parliament assumes the legislative power of the state during the operation of the Presidential proclamation. Further, the President is empowered to make incidental and consequential provisions for proper exercise of the power under this Article. The proclamation may be revoked by a subsequent proclamation. A Proclamation issued under this Article shall be laid before both the Houses of Parliament, before two months from the date of its proclamation. It shall cease to operate at the expiry of two months unless it has been approved by both the Houses of Parliament. If the proclamation is approved by the Parliament it will remain in operation of 'six months'. Parliament may extend the duration of Proclamation for 'six months' at a time but no such Proclamation shall in any case remain in force more than three years (and five years in case of Punjab). After the expiry of the maximum period of three years (five years in case of Punjab), neither the Parliament nor the President shall have power to continue a Proclamation and the constitutional machinery must be restored to the State.

According to Article 356, the President, on receipt of a report from the Governor of a State or otherwise is satisfied that a situation has arisen, in which the Government cannot be carried on i.e., the Constitutional machinery is failed; he may issue proclamation for taking over the Government (President's Rule).

Article 356 (1) states that failure of Constitutional machinery in a State may be proclaimed by the President if he is satisfied, either on the report of the Governor, or otherwise, that a situation has arisen in which a Government of the State cannot be carried on in accordance with the provisions of the Constitution.

Duration of Proclamation issued under Article 356: Clause (3) of Article 356 requires that every Proclamation issued under Article 356(1) shall be laid before each House of Parliament. It is with a view to afford an opportunity to the Parliament to approve the action taken by the Executive in regard to the situation prevailing in the concerned State.

Clause (3) further provides that the Proclamation so laid before the Houses of the Parliament, shall cease to have effect at the expiration of 3 months unless before the expiration of these 2 months, it has been approved by resolutions of both Houses of Parliament.

Thus without the approval by the Houses of Parliament, a Proclamation relating to State Emergency can continue in operation only for 2 months from the date it is made by the President.

The maximum period for which a Proclamation can remain in operation is 3 years from the date it is issued under clause (1) of Article 356.

Invocation of Article 356 is subject to criticism on the ground that it is being misused by the centre for political ends. Since the commencement of the Constitution, President's Rule has been imposed several times under Article 356. Nine Assemblies were dissolved in 1977; another nine in 1980, and different assemblies in 1983 (Punjab); 1986 (J & K); 1988 (Tamil Nadu) in 1992 (Nagaland and U.P.) and in Madhya Pradesh, Himachal Pradesh and Rajasthan in 1993; U.P. in 1995, 1996 and 1998 and recently in Bihar in 1999.

Consequences/Effects of State Emergency:

1. **Executive Powers:** If there is no emergency in the State, the Governor exercises his powers/functions on the advice of the Council of Ministers headed by the Chief Minister. But, after the proclamation of emergency i.e., during the emergency

period, the Governor's power is transferred to the President and the President exercises such functions on the advice of the Council of Ministers at the Centre.

2. **Legislative Powers:** Article 357 enumerates that, during the period of the State emergency, the legislative powers of the State shall be transferred/vested in the Parliament. The Parliament may confer such power to the President and the President may sub-delegate it to the State.

Article 357(2) States that such law passed by the Parliament or the President or other authority shall remain in force until it is altered or repealed or amended by the competent authority.

In ***S.R. Bommai v. Union of India,*** **(1994) 3 SCC 1: AIR 1994 SC 1918, 2102)**–a Nine Member Constitution Bench of the Supreme Court held that the dismissal of the B.J.P. Governments in Madhya Pradesh, Rajasthan and Himachal Pradesh in the wake of the Ayodhya incident of December 6, 1992 was valid and imposition of the President's rule in these States was constitutional. The Court held that 'secularism' is a basic feature of the Constitution and any State Government which acts against that ideal can be dismissed by the President. It was held that in matters of religion the State has no place. No political party can simultaneously be a religious party as well as political party.

In this case, the Supreme Court laid down the following principles–

(1) In Article 356, the President means the Union Council of Ministers. The satisfaction referred to in Article 356 is subjective satisfaction. The satisfaction has to be formed on a consideration of all the facts and circumstances. Article 356 confers a power upon the President to be exercised only where he is satisfied that a situation has arisen where the Government of a State cannot be carried on in accordance with the

provisions of the constitution. Under the Indian constitution, the power is in the Union Council of Ministers with the Prime Minister at its head.

(2) The power conferred by Article 356 upon the President is a conditioned power. It is not an absolute power, but is a constitutional power. The existence of material– which may comprise of or include the report of the Governor– is a precondition. The satisfaction must be formed on relevant material.

(3) State Assembly can be dissolved only after Parliament approves Central rule. Until such approval, the President can only suspend the Legislative Assembly by suspending the provisions of the Constitution relating to the Legislative Assembly under sub clause (c) of clause (1) of Article 356.

(4) The Constitution of India has created a federation but with a bias in favour of the Centre. Within the sphere allotted to the State they are supreme.

(5) Article 74(2) is not a bar against the scrutiny of the material on the basis of which the President had arrived at this satisfaction.

(6) When the President's issues Proclamation under Article 356(1), he may exercise all or any of the powers under sub clauses (a), (b) and (c) thereof. It is for him to decide which of the said powers he will exercise, and at what stage, taking into consideration the exigencies of the situation.

(7) Imposition of President's rule and dissolution of State Assembly cannot be done together.

(8) State Assembly can be dissolved only after Parliament approves Central rule.

(9) If a State Government works against secularism, President's rule can be imposed.

(10) If both the Houses of Parliament disapprove or do not approve the Proclamation, the Proclamation lapses at the end of the two months period. In such a case the Government which was dismissed revives. The Legislative Assembly which may have been kept in suspended animation gets reactivated. If the Proclamation is approved by both the Houses within two months, the Government can not be revived.

(11) No wholesale dismissal of opposition ruled State Governments when a new political party assumes power at the Centre.

(12) The power under Article 356 is an exceptional power and has to be resorted to only occasionally to meet the exigencies of special situations.

(13) Article 356 cannot be invoked for superseding a duly constituted ministry and dissolving the Assembly or the sole ground that in the elections to the Lok Sabha, the ruling party in the State suffered a massive defeat.

(14) Presidential Proclamation dissolving a State Legislative Assembly is subject to judicial review.

(15) Burden lies on the Government of India to prove that relevant material existed (to justify the issue of Proclamation Courts would not go into the correctness of the material.

(16) If President's rule is imposed only on political considerations the Court can even restore the assembly.

(17) The Supreme Court or a High Court can compel the Union Government to disclose material on whose basis President's rule is imposed on a State.

(18) If the Proclamation issued is held invalid, then notwithstanding the fact that it is approved by both the Houses of the Parliament, it will be open to the Court to restore the *status quo ante*, to the issuance of the Proclamation and hence to restore the

status quo ante, it will be open for the court to mould relief suitably and declare as valid actions taken by the President till that date. It will also be open for the Parliament and the Legislature of the State to validate the said actions of the President.

The Proclamations dated 21-04-1989 and 11-10-1991 and the action taken by the President in removing the respective Ministries and the Legislative Assemblies of the State of Karnataka and the State of Meghalaya Challenged in Civil Appeal No.3645 of 1989 and Transfer cases Nos.5 and 7 of 1992 respectively is unconstitutional. The Proclamation dated 07-08-1988 in respect of Nagaland is also held unconstitutional.

The proclamation dated 15th December, 1992 and the actions taken by the President removing the Ministries and dissolving the Legislative Assemblies in the State of Madhya Pradesh, Rajasthan and Himachal Pradesh pursuant to the said Proclamation are unconstitutional.

In view of the above, there has been a demand/proposal for abolition/deletion of Article 356. In the interests of free democracy, rational limitations on invoking this Article is necessary.

3. FINANCIAL EMERGENCY (ARTICLE 360)

Article 360 provides that if the President is satisfied that the financial stability or credit of India or any part thereof is threatened, he may proclaim financial emergency. Article 360 of the Indian Constitution lays down the provisions relating to "Financial Emergency". The President is empowered to issue proclamation of financial emergency, if he/she is satisfied that a situation has arisen, whereby the financial instability or credit of India or any part of the territory of India is threatened. It runs as follows–

(1) If the President is satisfied that a situation has arisen whereby the financial stability or credit of India or of any part the

territory thereof is threatened, he may by a Proclamation make a declaration to that effect.

(2) A Proclamation issued under clause (1)–

a) May be revoked or varied by a subsequent Proclamation.

b) Shall be laid before each House of Parliament.

c) Shall cease to operate at the expiration of two months unless before the expiration of that period it has been approved by resolutions of both Houses of Parliament.

Proclamation that if any such Proclamation is issued at a time when the House of the People has been dissolved or the dissolution of the House of the people takes place during the period of two months referred to in sub clause (c) and if a resolution approving the Proclamation has been passed by the Council of States, but no resolution with respect to such Proclamation has been passed by the House of the People before the expiration of the period, the Proclamation shall cease to operate at the expiration of thirty days from the date on which the House of the People first sits after its reconstitution, unless before the expiration of the said period of thirty days a resolution approving the Proclamation has also been passed by the House of the people.

(3) During the period any such Proclamation as is mentioned in clause (1) is in operation, the executive authority of the Union shall extend to the giving of directions to any State to observe such canons of financial propriety as may be specified in the directions, and to the giving of such other directions as the President may deem necessary and adequate for the purpose.

(4) Notwithstanding anything in this Constitution–

a) Any such direction may include–

i) A provision requiring the reduction of salaries and allowances of all or any class of persons serving in connection with the affairs of a State;

ii) A provision requiring all Money Bills or other Bills to which the provisions of Article 207 apply to be reserved for the consideration of the President after they are passed by the Legislature of the State;

b) It shall be competent for the President during the period any Proclamation issued under this Article is in operation to issue directions for the reduction of salaries and allowances of all or any class of persons serving in connection with the affairs of the Union including the Judges of the Supreme Court and the High Courts.

The Constitution (38th Amendment) Act, 1975, added a new clause (5) which declares that the satisfaction of the President shall be final and conclusive and shall not be questioned in any court on any ground. But this new clause (5) has been deleted by the Constitution (44th Amendment) Act, 1978.

Financial emergency means a situation where creditworthiness of the Union Government and of the States as doubted. Mere financial difficulties in meeting any expenditure is not a ground for imposing financial emergency. During the financial emergency the President may issue directives to the Union and States to observe economy in expenditure. He may direct salaries payable to the staff including the Judges may be reduced. The cuts in salary so affected may be returned after the declaration of financial emergency ceases. Even through the Article 360 does not speak of payment of the withheld part of the salary it is the prestige of the State to pay arrears when the Union and/or the States regain financial stability. The President may during the financial emergency can suspend fulfillment of any contractual obligation. If any payments are withheld, the same may be paid after the financial emergency ceases. If withheld obligations and payments are not satisfied after the financial emergency it shall not be counted as a Constitutional infringement.

Duration of Financial Emergency: Clause (2) of Article 360 provides that the Proclamation issued by the President under Clause (1) of Article 360 may be revoked or varied by a subsequent Proclamation made by him. A Proclamation concerning financial emergency is required to be laid before each House of Parliament. The Proclamation so made ceases to operate at the expiration of two months unless before the expiration of these two months, it has been approved by resolutions passed by both Houses of Parliament. When both Houses of Parliament have passed resolutions approving the proclamation, it shall continue to operate until revoked by the President by making a fresh Proclamation under Article 360(2)(a).

Effects of Financial Emergency: The object of issuing a Proclamation of Financial Emergency is to achieve financial stability. A Proclamation so issued has following effects:

a) During the period, a Proclamation of Financial Emergency is in operation the executive authority of the Union extends—
   1. To the giving of directions to the States to observe such canons of financial propriety as may be specified in the directions; and
   2. To the giving of such other directions as he President may deem necessary and adequate for the purpose;
   3. To the giving of directions requiring the reduction of salaries and allowances of all or any class of persons serving in connection with the affairs of a State;
   4. To the giving of directions requiring all Money Bills or other Bills to which the Provisions of Article 207 apply (i.e., Financial Bills or Bills involving expenditure from the Consolidated Fund of the States) to be reserved for the consideration of the President after they are passed by the Legislature of the State.

b) During the period a Proclamation of Financial Emergency in operation, it shall be competent for the President to issue directions for the reduction of salaries and allowances of all or any class of persons serving in connection with the affairs of the Union including the Judges of the Supreme Court and the High Courts.

Lecture - XI

Amendment of the Constitution (Part-XX: Article 368)

Introduction: Indian Constitution came into force on 26.1.1950. The provisions of the Constitution were so designed to meet the socio economic conditions prevailing at that time. As the time passed, the social, economic and political conditions of the people go on changing. To meet the changing conditions, there shall be an appropriate mechanism to mould/alter the provisions of the Constitution. Such a mechanism is called 'the Amendment of the Constitution'.

Part XX containing Article 368 of the Constitution confers on the Parliament, power to amend the Constitution. It runs as follows–

(1) Notwithstanding anything in this Constitution, Parliament may in exercise of its constituent power amend by way of addition, variation or repeal any provision of this Constitution in accordance with the procedure laid down in this article.

(2) An amendment of this Constitution may be initiated only by the introduction of a Bill for the purpose in either House of Parliament, and when the Bill is passed in each House by a majority of the total membership of that House and by a majority of not less than two thirds of the members of that House present and voting, (it shall be presented to the President who shall give his assent to the Bill and thereupon) the Constitution shall stand amended in accordance with the terms of the Bill.

Provided that if such amendment seeks to make any change in—

a) Article 54, Article 55, Article 73, Article 162 or Article 241, or

b) Chapter IV of Part V, Chapter V of Part VI, or chapter I of Part XI, or

c) Any of the Lists in the Seventh Schedule, or

d) The representation of States in Parliament, or

e) The provisions of this article,

The amendment shall also require to be ratified by the Legislatures of not less than one half of the States by resolution to that effect passed by those Legislatures before the Bill making provision for such amendment is presented to the President for assent.

(3) Nothing in Article 13 shall apply to any amendment made under this article.

(4) No amendment of this Constitution (including the provisions of Part III) made or purporting to have been made under this Article (whether before or after the commencement of Section 55 of the Constitution (42nd Amendment) Act, 1976 shall be called in question in any court of any ground.

(5) For the removal of doubts, it is hereby declared that there shall be no limitation whatever on the constituent power of Parliament to amend by way of addition, variation or repeal the provisions of this Constitution under the article.

'Amendment of the Constitution' is the process by which certain provisions of the Constitution are changed. However, this amending power is subject to a restriction that the basic structure of the Constitution should not be destroyed. So our Indian Constitution has been amended for 99 times since 1951 to till date vide the Constitution (ninety ninth Amendment) Act, 2014, dated 31-12-2014, which envisages the establishment/constitution of the Judicial Appointments Commission for recruitment of the judges of the High Courts and the Supreme Court of India.

Jawaharlal Nehru says, 'while we want this Constitution to be as solid and permanent as we can make it, there is no permanence in Constitution. There should be certain flexibility. If you make anything rigid and permanent, you stop the nation's growth, the growth of a living, vital, organic people. In any event, we could not make this constitution so rigid, it cannot be adapted to changing condition when the world is in turmoil and we are passing through a very swift period of transitions, what we may do today may not be wholly applicable tomorrow.'

Dr. Ambedkar says, 'One can, therefore, safely say that the Indian Federation will not suffer from the faults of rigidity of legalism. Its distinguishing feature is that it is a flexible federation.'

Constitution in any country regulates the affairs between the individuals and State. To meet the changing conditions, economic, social, cultural and political, constitutional provisions need change. Constitution of a country may be flexible or rigid. A Constitution is said to be flexible, if it provides a simple procedure for its amendment. A rigid Constitution on the other hand is one, which requires a special, complex and more technical procedure for its amendment. The Constitution of the U.S., Switzerland etc., are rigid. Indian Constitution is both flexible and rigid.

Classification of Amendment: In view of the importance of the various constitutional provisions, the amending process/ procedure has been classified into three categories as follows:

1. Amendment by Simple Majority;
2. Amendment by Special Majority; and
3. Amendment by Special Majority and Ratification by States.

1. Simple Majority: 'Simple Majority' denotes passing of an ordinary Bill by more than fifty per cent of the members present and voting. Certain provisions viz., Articles 5, 169 and 239-A can be amended by a simple majority. These Articles are excluded from the amending procedure under Article 368.

2. Special Majority: It requires acceptance of majority members in each House of the Parliament and also two-thirds majority of the members present and voting.

3. Special Majority and Ratification of States: Amendment of certain provisions, which are of great importance requires ratification by not less than one-half of the State Legislatures in addition to the special majority as referred to in the proviso to Article 368(2) as in respect of the following–

a) Articles 54 and 55– The manner of Election of the President.

b) Articles 73 and 162 the extent of the Executive Powers of the Union and States.

c) Chapter IV of Part V– Provisions dealing with the Union Judiciary (Articles 124-147).

d) Chapter V of Part VI– Provisions dealing with the Courts in States (Articles 214-231).

e) Article 241– High Courts for Union territories.

f) Chapter I of Part XI– Legislative Relations (Articles 245–255).

g) Lists (I, II & III) of Seventh Schedule to the Constitution.

h) The representation of States in Parliament– Fourth Schedule.

i) The Procedure of amendment of the Constitution– Article 368.

Procedure for Amendment (Article 368): According to Article 368 of the Indian Constitution, a Bill proposing to amend the Constitution is introduced in either House of the Parliament. It must be passed by the majority of both the Houses and also two-third members present and voting. Then, it (the Bill) is sent to President for his assent. If the Bill requires ratification by one-half of the State Legislatures, it should be sent to the President for his assent after such ratification.

Powers of the Parliament to amend the Constitution: There has been a great controversy as to the question 'whether Parliament has an absolute/unlimited power to amend the Constitution or not. There are two divergent views on this question, one in affirmative, while the other in negative.

According to the first view, the amending power of the Parliament is absolute and unlimited since the framers of the Constitution did not impose any restrictions on the amending power of the Constitution. According to the second view, Parliament is one of the three organs of the Government and is created under the Constitution. In other words, Constitution is supreme, not the Parliament. Therefore, the amending power of the Parliament is not absolute, but limited.

The Supreme Court sometimes followed the first view and some other times followed the second view until its decision in ***Kesavananda Bharati's Case*** **(1973).**

Whether the Parliament can amend Fundamental Rights: There had been a great controversy as to the question, whether Parliament can amend Fundamental Right? This question came for discussion before the Supreme Court in:

Shankari Prasad v. Union of India **(AIR 1951 SC 458)–** In this case, the validity of the Constitution (1st Amendment) Act, 1951 was challenged on the ground that it abridges fundamental rights. But, the court rejected this contention and upheld the 1st Amendment following the first view, stated above. Again in:

Sajjan Singh v. State of Rajasthan **(AIR 1965 SC 845)–** In this case, the validity of the Constitution (17th Amendment) Act, 1964 was upheld by the Supreme Court, on the ground that the amending power of the Parliament under Article 368 is unlimited, which may extend to amend the fundamental rights.

While deciding the above two cases, the Supreme Court viewed that the Constitutional amendment is not a law under Article 13 of the Constitution.

However, the Supreme Court followed the second view and held that the Parliament has no power to amend the Constitution in

Golaknath v. State of Punjab **(AIR 1971 SC 1643)**– In this case, the court struck down the Constitutional validity of the 17th Amendment.

The Constitution (24th Amendment) Act, 1971: In order to overcome/nullify the Supreme Court's decision in ***Golaknath's Case*** several amendments viz., 24th, 25th, 27th etc. were made. The 24th Amendment Act, 1971 substituted the heading **"Power of the Parliament to amend the Constitution and Procedure therefor"** to Article 368 in the place of "procedure for amendment of the Constitution." This new marginal heading confers absolute power on the Parliament to amend any part of the Constitution.

The Theory of Basic Structure or the Decorative of Basic Structure:

The validity of the 24th Amendment was challenged in– ***Kesavananda Bharati v. State of Kerala*** **(AIR 1973 SC 1461).** This case is popularly known as 'Fundamental Rights Case.' The Supreme Court upheld the validity of the 24th Amendment and held that Parliament can amend any part of the Constitution including the preamble subject to the condition that the basic features or basic structure of the Constitution should not be destroyed by such amendment.

The Supreme Court by evolving the 'Basic Structure Theory' removed the conflict between the above two theories, i.e., Parliament's power to amend is unlimited or limited. Now the question arises is: "What is basic structure?"

The majority of seven Judges of the Supreme Court in ***Kesavananda Bharati's Case*** did not define 'basic structure,' but

recognised certain items as the features of Basic Structure as follows:

1. Republican and Democratic form of Government.
2. Secular character of the Constitution.
3. Supremacy of the Constitution.
4. Separation of powers between the legislature, the executive and the judiciary.
5. Federal character of the Constitution.
6. Sovereignty of the Country.
7. The dignity of the individual.
8. Freedom and basic rights in Part III.
9. Welfare or economically just society as per the Principles under Part IV Egalitarian Society.
10. Justice, Social, Economic and Political.
11. Liberty of thought, expression, belief, faith and worship.
12. Equality of status and opportunity.
13. Parliament with Lok Sabha and Rajya Sabha.

The Supreme Court in post ***Kesavananda cases*** recognised some more items as basic features of the Constitution.

***Indira Nehru Gandhi v. Rajnarain* (AIR 1975 SC 2299)**– In this case, two more items viz., free, just, fair elections and Rule of Law were held to be basic features of the Constitution. Accordingly the Constitution 39th Amendment was held unconstitutional.

***Minerva Mills v. Union of India* (AIR 1980 SC 1789)**– In this case, harmonious construction between Part III (Fundamental Rights) and Part IV (Directive Principles) was held to be basic structure and hence, the 42nd Amendment was held unconstitutional.

Further, the Rule of Law in ***Samba Murthy v. State of A.P.,*** **(AIR 1987 SC 663),** Independence of Judiciary in ***Kumar Padma Prasad v. Union of India,*** **(AIR 1992 SC 1213),** Parliamentary Democracy in ***Kitho Hallohan v. Zachillhu,*** **(AIR 1993 SC 412),** Secularism in ***Valasamma Veocluin University*** **(AIR 1996 SC 1101),** Judicial Review in ***Chandra Kumar v. Union of India*** **(AIR 1997 SC 1125)** and

In ***State of Bihar v. Bal Mukund Sah & Ors.*** **(AIR 2000 SC 1296 @ 1371)** - the Supreme Court observed that the concepts of 'Separation of Powers between the legislature, executive and Judiciary' as well as 'the fundamental concept of independent judiciary have been now elevated to the level of basic structure of the constitution and are the very heart of constitution scheme.'

It is clear from the above that, the amending power of the Parliament under Article 368 is not absolute and unlimited since it is subject to basic structure theory. But the problem is, the concept of basic structure has not been defined. Therefore, it is high-time for the Supreme Court to define/specify the basic structure so as to avoid future conflicts.

History of Constitutional Amendments: The Constitution of India, which came in to force on 26-01-1950 was so drafted keeping in mind the conditions, social cultural, economic and political, prevailing at that time i.e. in 1950. As time passed, it has been amended from time to time so as to cater the needs of the changing conditions, social, cultural, economic and political. So far, 105 Amendment Acts have been passed since 18th June 1951 to till date vide passing of the Constitution (One Hundred and Fifth Amendment) Act, 2021, w.e.f. 15-09-2021. The list of the Amendment Acts from 1951 to 2019 is detailed below–

No. of Amendment	Date of Commencement	Amendment made
1st, 1951	18-06-1951	Articles amended are 15, 19, 85, 87, 174, 176, 341, 342, 376 Articles 31.A, 31.B are inserted and Ninth Schedule has been added Passed to remove difficulties created by several decisions of the Supreme Court relating to Land Reform Acts and validity of Zamindari abolition Laws.
2nd, 1952	01-05-1953	Article Amended is 81.
3rd, 1954	29-02-1955	Seventh Schedule List III has been amended. A new Entry 33 has been substituted for the original Entry 33.
4th, 1955	27-04-1955	Articles amended are 31, 31.A, 305 Ninth Schedule has been amended.
5th, 1955	24-12-1955	Article 3 has been amended.
6th, 1956	11-09-1956	Articles amended are 269, 286 List II, Entry 54, List Entry 92.A of Seventh Schedule have been amended.
7th, 1956	01-11-1956	Articles amended 45, 80, 81, 81, 131, 153, 158, 168,170, 171, 216, 217, 220, 222, 224, 230, 231, 232, 239, 240, 298, 371. Articles inserted were 258, 290.A, 350.A, 350.B, 372.A. Schedules amended are First, Second, Fourth and in Seven

No. of Amendment	Date of Commencement	Amendment made
		Schedule List I. Entries 32, 67; List II. Entries 12, 24; List III, Entry 40.
8th, 1959	05-01-1960	In Article 334, '20 years' substituted for '10 years'.
9th, 1960	17-01-1961	First Schedule amended to transfer certain territories to Pakistan.
10th, 1961	11-08-1961 (with retrospect)	Article 240 and First Schedule amended to incorporate Dadra and Nagar Haveli as a Union Territory.
11th, 1961		19-12-1961 Article 66(1) and 31(3) are amended to narrow down grounds for challenging validity of election of President and Vice President.
12th, 1962	20-12-1961 (with retrospect)	Article 240 and First Schedule are amended to incorporate Goa, Daman and Diu as a Union Territory.
13th, 1962	01-12-1963	Article 371.A has been inserted to make special provisions for the administration of the State of Nagaland.
14th, 1962	28-12-1962	i) Form Pondicherry as Union Territory with French Colonies. ii) Enabled the Union Territories of Himachal Pradesh, Manipur, Tripura, Goa,

No. of Amendment	Date of Commencement	Amendment made
		Daman and Diu and Pondicherry to have Legislatures and Council of Ministers. iii) Raised the representation for Union Territories in Loksabha from 20 to 25.
15th, 1963	05-10-1963	Amended the Articles of 124, 128, 217, 222, 224, 224.A, 226.A, 297, 311, 316 and the Entry 78 of List I of the Seventh Schedule to extend the Jurisdiction of the High Courts and raising the age of retirement of High Court Judges from 60 to 62 years.
16th, 1963	05-10-1963	It amends Article 19 and consequential Charges in Articles 84, 173 and the Third Schedule.
17th, 1964	20-06-1964	Amends Article 31.A; Entries 21-64 added to the Ninth Schedule.
18th, 1966	27-08-1966	Adding Explanation to Article 3; Provision was made for the formation of two States, Punjab and Haryana and explanation to Article 3, was added to clarify that the Parliament has the power to create a new State or Union Territory.
19th, 1966	11-12-1966	Amending Article 324 to clarify the duties of the Election Commission.

No. of Amendment	Date of Commencement	Amendment made
20th, 1966	22-12-1966	Article 233.A has been inserted to validate the appointment of District Judges.
21st, 1967	10-04-1967	Includes 'Sindhi' in the List of Languages in the Eighth Schedule.
22nd, 1969	25-09-1969	Inserts Articles 244.A, 371.B and C.1 (1.A) in Article 275 to Constitute an autonomous State of Assam (Meghalaya).
23rd, 1970	23-01-1970	Amending Articles 330, 332, 333, 334 to extend the period of reservation for Scheduled Castes and Tribes.
24th, 1971	05-11-1971	Inserting C.1(4) in Article 13 and amending Article 368 to make the President to bound to assent to a Constitution Amendment Bill and to make clear that Parliament has power to amend every part of the Constitution.
25th, 1971	20-04-1972	Clause (2) of Article 31 has been amended and Article 31.C is inserted.
26th, 1971	28-12-1971	Omitting Articles 291 and 362, inserting Article 363.A; amending Article 366(22). The privy purses were abolished and the recognition to the Rulers of Princely States was withdrawn.

No. of Amendment	Date of Commencement	Amendment made
27th, 1971	5-3 from 30-12-1971 rest from 15-02-1972	Amending Article 239.A and 240, inserting Articles 239.A and 371.C Two new Union Territories-Mizoram and Arunachal Pradesh were formed.
28th, 1972	29-08-1972	Inserting Article 312.A; Omitting Article 314; The conditions of Service and privileges of former ICS Officers were abolished.
29th, 1972	09-06-1972	Adding items 65-66 to the Ninth Schedule Two Kerala Acts pertaining to land reforms were included in the Ninth Schedule.
30th, 1972	27-02-1973	Amending Article 133(1) appeals which involve a substantial question of Law only can be brought to the Supreme Court.
31st, 1973	17-10-1973	Amending Articles 81, 330, 332 Elected seats in Lok Sabha has been increased from 525 to 545.
32nd, 1973	01-07-1974	Amending Article 371(1) and Inserting Articles 371.D-371.E; amending Entry 63 of List I, Seventh Schedule. Certain Provisions with respect to the State of Andhra Pradesh.
33rd, 1974	19-05-1974	Amending Articles 101, 190– Provides that if a member of State Legislature or Parliament sends his resignation, to the

No. of Amendment	Date of Commencement	Amendment made
		Chairman or speaker would satisfy himself that it is voluntary and genuine.
34th, 1974	07-09-1974	Adding items 67-86 to the Ninth Schedule.
35th, 1974	01-03-1975	Inserting Article 2.A and amending Articles 80-81; adding Tenth Schedule. Sikkim was made an associate State.
36th, 1975	26-04-1975	Omitting Article 2.A, Schedule X; adding item 22 to Schedule I; adding Entry 22 to Schedule IV. Sikkim was made a full pledged State.
37th, 1975	03-05-1975	Amending Articles 239.A-240; repealing Tenth Schedule Provision was made to a legislative Assembly and Council of Ministers for the Union Territory of Arunachal Pradesh.
38th, 1975	01-08-1975	Amending Articles 123, 213, 239.B, 352, 356, 359, 360. Declaration of Emergency by the President over which the judiciary would not be able to exercise its power of review.
39th, 1975	10-08-1975	Amending Article 37; inserting Article 329.A amended Ninth Schedule.
40th, 1976	27-05-1976	Substituting Article 297; adding Entries 125 to 188 to Schedule IX.

No. of Amendment	Date of Commencement	Amendment made
41st, 1976	07-09-1976	Amending Article 316 raising the upper age limit of members of State Public Service Commission from 60 to 62 years.
42nd, 1976	Different dates commencing from 03-01-1977 as mentioned in it.	Amending Preamble, Articles 31.C, 39, 55, 74, 77, 81, 82, 83, 100, 102, 105, 118, 145, 166, 170, 172, 189, 191, 194, 208, 217, 225, 227, 228, 311, 312, 330, 352, 353, 356, 357, 358, 359, 366, 368, 371.F, Seventh Schedule. Submitting Articles 103, 150, 192, 226, Inserting Articles 31.D, 32.A, 39.A, 43.A, 48.A, 51.A, 131.A, 139, 144.A, 226.A, 228.A, 257.A, 323.A, 323.B. Three new words 'Socialism', 'Secularism' and 'Integral' were inserted in the Preamble. This amendment was almost a complete revision of the Constitution. It was enacted during an Emergency. Inserted Fundamental duties and brought changes about Fundamental Rights and Directive Principles. The next government that came into power in 1977 repealed most of the amendments.
43rd, 1977	13-04-1978	Omitted Articles 31.D, 32.A, 131.A, 144.A; amending Article 145. This amendment

No. of Amendment	Date of Commencement	Amendment made
		omitted many Articles inserted by the 42nd Amendment Act. Some Articles were changed.
44th, 1978	Different dates as notified.	Omitting Articles 19(1) (f), 31, 77(4), 123(4), 166(4), 213(4), 239.B(4), 257.A, 329.A. Inserting Articles 30(1.A), 134(A), 300.A, 361.A. Amending and substituting Articles 19(1),22, 31.A, 31.C, 38, 71, 74, 83, 103, 105, 123, 132, 134, 139.A, 172, 192, 194, 217, 225, 226, 227, 329, 352, 356, 358, 359, 360, 361, 371.F. Cancelling the amendments made by the 42nd Amendment Act to Articles 100, 102, 105, 118, 191, 194, 208. The changes made by the 42nd Amendment or altered and the constitution was brought back in its original form. But the right to Property was taken away from the Chapter of Fundamental Rights and put as a new Article 300.A.
45th, 1980	25-01-1980	Extending reservation under Article 334 from 30 to 40 years.
46th, 1982	02-02-1983	Amending Articles 269, 286, 366, List 1, relating to Sales Tax.
47th, 1984	26-08-1984	Adding Entries 189-202, to the Ninth Schedule.

No. of Amendment	Date of Commencement	Amendment made
48th, 1984	26-08-1984	Inserting Proviso to Clause (5) of Article 356 to extend President's Rule in Punjab.
49th, 1984	01-04-1985	Amending Article 244, Fifth and Sixth Schedules. Sixth Schedule was made applicable to Tripura.
50th, 1984	11-09-1984	Substituting Article 33.
51st, 1984	16-06-1986	Amending Articles 330, 332.
52nd, 1985	01-03-1985	Amending Articles 101, 102, 190, 191; adding Tenth Schedule (anti-definition).
53rd, 1986	14-08-1986	Adding Article 371.G. Mizoram was made a State.
54th, 1986	01-04-1986	Amending Articles 125, 221 and Second Schedule. Appropriate provisions were made to increase the salary of the judges of the Supreme Court and High Court.
55th, 1986	20-02-1987	Inserting Article 371.H. State of Arunachal Pradesh was formed.
56th, 1987	30-05-1987	Inserting Article 371.I. Goa was made State and Daman & Diu was made to Continue as a Union Territory.
57th, 1987	21-09-1987	Clause (3.A) was inserted in Article 332. Articles 330 and 332 were amended to make provision for reservation of sets for Scheduled Tribes of Nagaland. Meghalaya, Mizoram and

No. of Amendment	Date of Commencement	Amendment made
		Arunachal Pradesh in the Lok Sabha and in the legislative assemblies of Nagaland and Meghalaya.
58th, 1987	09-12-1987	Inserting Article 394.A authorized the president to publish the authoritative text of the Constitution in Hindi.
59th, 1988	30-03-1988	Article 356 was amended to provide that the declaration of emergency may remain in operation up to 3 years.
60th, 1988	20-12-1988	Amending Article 276, to increase the limit of professional tax from Rs.250/- to Rs.2,500/-
61st, 1989	28-03-1989	Amending Article 326 to reduce the voting age from 21 to 18 years.
62nd, 1989	20-12-1989	Amending Article 334 to increase the period of reservation of seats for S.Cs. and S.Ts. for 10 years i.e. up to the year 2000 A.D.
63rd, 1989	06-01-1990	Amending Article 356 (omitting proviso to Clause (5). Omitting Article 359 with regard to Punjab. Clause (5) was inserted in Article 356 and a new Article 359.A had been added. Both of these were omitted to and the emergency in Punjab.

No. of Amendment	Date of Commencement	Amendment made
64th, 1990	16-04-1990	Amending Article 356. As normally could not be restored in Punjab, emergency was to be continued. For that necessary provision was made in Article 356.
65th, 1990	12-03-1992	Amending Article 338, to provide for a National Commission for S.Cs. and S.Ts. The Commission has been given wide powers.
66th, 1990	07-06-1990	Inserted Entries 203 to 257 relating to land reforms Acts in the Ninth Schedule.
67th, 1990	04-10-1991	Amending Article 356, 3rd Proviso, Clause (a) extending President's Rule in Punjab to 4 years.
68th, 1991	12-03-1991	Amending Article 356, 3rd Proviso, Clause (a) extending the period to 5 years.
69th, 1991	01-02-1992	Inserting Articles 239.AA and 239.AB to provide for a legislative Assembly and Council of Ministers for the Union Territory of Delhi.
70th, 1992	Section 3 from 21-12-1991 and Section 2 from 12-08-1992	Amending Articles 54 and 368 to include Members of Legislative Assembly of Union Territories of Delhi and Pondicherry in the electoral college.

No. of Amendment	Date of Commencement	Amendment made
71st, 1992	31-08-1992	Inserting entries 7, 9, 11 and reinserting some entries in 8th Schedule.
72nd, 1992	05-12-1992	Inserting Clause (3B) in Article 332.
73rd, 1992	24-04-1993	Insert Part IX (Articles 243, 243.A to 243.O; Eleventh Schedule Statutory provisions for Panchayat Raj.
74th, 1992	01-06-1993	Insert Part IX-A containing Articles 243.P to 243.ZG; Twelfth Schedule. Statutory Provisions relating to Nagarpalika.
75th, 1993	05-02-1994	Inserting Sub Clause (h) in Article 323.B (2).
76th, 1994	31-08-1994	Inserting entry 237.A in the IX Schedule. Enabling Continuance of 69% reservation in Tamil Nadu by including the relevant Tamil Nadu Act under 9th Schedule of the Constitution.
77th, 1995	17-06-1995	Inserting Clause (4A) in Article 16.A technical amendment to protect reservation to S.C/S.T Employees in promotions.
78th, 1995	30-08-1995	Further addition of 27 entries to the IX Schedule of the Constitution.
79th, 1999	25-01-2000	Substituting 'Sixty years' for the words 'fifty' years in Article 334.

No. of Amendment	Date of Commencement	Amendment made
80th, 2000	01-04-1996	Substituting new Clauses for Clauses (1) and (2) of Article 269; new Article for Article 270; and omitting Article 272.
81st, 2000	09-06-2000	Inserting Clause (4B) in Article 16 Protect S.C/S.T reservation in filling backlog of vacancies.
82nd, 2000	08-09-2000	Inserting a Proviso to Article 335 permit relaxation of qualifying marks and other criteria in reservation in promotion for S.C/ S.T Candidates.
83rd, 2000	08-09-2000	Inserting Clause (3A) in Article 243M. Exempt Arunachal Pradesh from reservation for S.Cs. in Panchayat Raj Institutions.
84th, 2001	21-02-2002	Substitution of the figures '2026' relating to census in Articles 55, 81, 82, 170, 330 and 332 for the figure '2000'. Extend the usage of 1971 national census, population figures for state wise distribution of parliamentary seats.
85th, 2001	17-06-1995	Substitution of certain words in Article 16(4A) to protect consequential seniority of reserved category retrospectively.

No. of Amendment	Date of Commencement	Amendment made
86th, 2002	12-12-2002	Insertion of Article 21A, Substitution of Article 45 and insertion of Article 51A(k). Provides Right to Education for age group of 6-14 and early childhood care until the age of six.
87th, 2003	22-06-2003	Substitution of the figure '2001' relating to census in Articles 81, 82, 170 and 330 for the figure '1991'.
88th, 2003	15-01-2004	Insertion of Article 268A, substitution of the words, figures and letters 'Articles 268, 268A and 269' for the words and figures 'Articles 268 and 269' in Article 270 and sertion of Entry '92C' in Union List.
89th, 2003	19-02-2004	Amendment of Article 338 and insertion of Article 338A. Formation of Separate Commissions for S.Cs and S.Ts.
90th, 2003	28-09-2003	Insertion of a proviso to Article 332(6).
91st, 2003	01-01-2004	Amendment of Articles 75, 164 and Schedule X, Insertion of Article 361B Restriction of Cabinet size to 15% of legislatures and strengthen; Anti-Definition laws.
92nd, 2003	07-01-2004	Addition of 'Bodi', 'Dogri', 'Maithilli' and 'Santali' languages in Schedule VIII.

No. of Amendment	Date of Commencement	Amendment made
93rd, 2005	12-06-2006	Insertion of Clause (5) in Article 15. To enable provision for reservation to OBC in Government as well private educational Institutions.
94th, 2006	12-06-1006	Amendment of Article 164.
95th, 2009	25-01-2010	Amending Article 334 to extend reservation for S.C, S.T and Anglo Indians in the House of people and Legislative Assemblies of the States for a further period of 10 years.
96th, 2011	23-09-2011	Amends Entry 15 of Eighth Schedule and substitutes the word 'Odiya' in place of 'Oriya' language.
97th, 2011	15-02-2012	Inserts Article 43B as Directive Principle of State Policy. Also inserts IX.B with 13 Articles 243ZH to 243ZT. Also confers constitutional states to Co-operative Societies.
98th, 2012	01-10-2013	Inserts new Article 371J empowering the President of India to order the Karnataka State to provide special responsibility on the Governor of Karnataka for establishment of a separate Development board for Hyderabad-Karnataka region.

No. of Amendment	Date of Commencement	Amendment made
99th, 2014	31-12-2014	Inserts new Articles 124A, 124B and 124C, 124A provides for establishment of National Judicial Appointments Commission. 124B provides for functions of the Commission. 124C confers on Parliament power to make law/ procedure for appointment of the judges of the High Courts and the Supreme Court. The Amendment Act of 2014 also brought about some changes in Articles 128, 217, 222, 224, 224A and 231 of the Constitution.
100th, 2015	31-07-2015	Amends First-Schedule to the Constitution.
101st, 2016	16-09-2016	Inserts new Articles 246A, 269A, 279A for introduction of GST.
102nd, 2018	14-08-2018	Inserts Article 338B, provides for establishment of National Commission for Backward Classes, Inserts Article 342A for Socially and Educationally Backward Classes.
103rd, 2019	14-01-2019	Amends Articles 15 & 16, provides for reservation for economically weaker sections.
104th, 2019	25-01-2020	Amends Article 334, the words "certain period" substituted for "seventy years".
105th, 2021	15-9-2021	Amends Articles 338B, 342A, 366.

Case Comment

I) Cases: Discuss the facts and law laid down in the following cases:

1. *S.R. Bommai v. Union of India,* (1994) 3 SCC 1: AIR 1994 SC 1918 (N.U., April 1999, Part-C, Q.No.17).

Answer:

Instant case refers to 'Proclamation of State Emergency under Article 356 of the Indian Constitution.

According to Article 356 of the Constitution "if the President, either on receipt of a report from the Governor of a State or otherwise, is satisfied that a situation has arisen in which the Government of the State cannot be carried on in accordance with the provisions of the Constitution, he may make a Proclamation to that effect."

Facts of the Case: The petitioner in the instant case, S.R. Bommai, Ex-Chief Minister of Karnataka, challenged the Constitutional validity of the proclamation of State emergency by the President under Article 356 of the Constitution. Further, the constitutional validity of the proclamations under Article 356 in the States of Meghalaya on October 11, 1999, Nagaland on August 7, 1988, U.P. on December 6, 1992, M.P. on December, 1992, Himachal Pradesh on December 15, 1992 and Rajasthan on December 15, 1992 were challenged before the Supreme Court.

In the State of Karnataka, elections to the Legislative Assembly were held in March 1985. Janata Dal Party came to the power and Ramakrishna Hegde was elected as the Chief Minister. Owing to certain conflicts, Ramakrishna Hegde resigned and S.R.

Bommai was elected as the Chief Minister in September 1988. Sometime later, a section of M.L.As in their letters dt.17.4.1989 and 18.4.1989 to the Governor complained that Bommai had no majority in the House. The Governor without giving him an opportunity to prove his majority on the floor, sent a report to the President on April 19, 1989 that the Constitutional machinery in the State was failed and recommended for the proclamation of emergency in the State. Accordingly, the President proclaimed the State emergency on April 21, 1989 under Article 356 of the Constitution and dismissed the Bommai Government and dissolved the Assembly.

Bommai filed a writ petition in the Karnataka High Court. The High Court held the proclamation issued under Article 356, not wholly outside the part of judicial scrutiny and dismissed the petition. He preferred an appeal to the Supreme Court.

Judgment: The majority of the Supreme Court declared that the Proclamation issued by the President must be held to be not warranted by Article 356(1). While looking into the facts of the case, the Court held that the Governor's report and the facts stated therein appeared to be the only basis of dismissing the Government and dissolving the Assembly under Article 356(1). It was a case where all canons of propriety were thrown to the wind and undue haste made by the Governor in inviting the President to issue the Proclamation under Article 356(1) clearly smacked of *mala fides.* A duly constituted Ministry, the Court held, was dismissed "on the basis of material which was neither tested nor allowed to be tested" and was no more than the *ipse dixit* of the Governor. Hence, the proclamation of State emergency (President's rule) in Karnataka was struck down.

The court declared unconstitutional the dismissal of the Meghalaya Government headed by Sri B.B. Lyngdoh in 1991, the Nagaland Government headed by Hokishe Sema in 1988.

In the States of Uttar Pradesh, Madhya Pradesh, Rajasthan and Himachal Pradesh elections to the Assembly were held in February 1990 and B.J.P. (Bharatiya Janata Party) came to the power. On December 6, Ram Janmabhoomi-Babri Masjid structure was demolished by the Sangh Pariwar, of which B.J.P. was a member. The demolition resulted in violence throughout the country. The Chief Minister of U.P., Kalyan Singh, owning moral responsibility had submitted the resignation of his Government to the Governor in December 1992.

The Assemblies of M.P., Rajasthan and Himachal Pradesh were dissolved vide three proclamations dated 15.12.1992 by the President. All these proclamations were upheld by a nine member Constitution Bench of Supreme Court as constitutional as these were based on the fact of violation of the secular features of the Constitution, which in the opinion of the Court was itself a ground to hold that a situation had arisen in which the Government of the concerned States could not be carried on in accordance with the provisions of the Constitution.

Principles: The Supreme Court laid down the following principles.

1. Article 356 confers extra-ordinary powers on the President. This power should be exercised sparingly and with great circumspection. The resort to Article 356(1) should be only as a last measure, which may be taken to resort constitutional machinery in the State.
2. The power conferred on the President under Article 356 is not absolute, but conditional.
3. The participation of the people in the Governance is "*a sine quo non*" of the democracy.
4. Though Article 356 does not expressly speak of the dissolution of the Legislative Assembly of the State, however, such power is implicit in sub-clause (a) of Article 356(1). Since

Article 174(2)(b) empowers the Governor to dissolve the Legislative Assembly and that the President under Article 356(1)(a) assumes to himself the powers and function of both of the Government and the Governor, he may dissolve the Legislative Assembly as part of the Proclamation issued under Article 356(1) or by a subsequent order.

5. The proclamation under Article 356 is subject to judicial review so as to avoid the misuse of the power under Article 356.

6. Secularism is a part of the basic structure of the Constitution. Hence, the acts of a State Government which were calculated to subvert or sabotage secularism as enshrined in the Constitution.

2. *Indira Nehru Gandhi v. Rajnarayan*, AIR 1975 SC 2299: 1975 Suppl. SCC 1–

Answer:

This case is popularly known as "Election Case." It refers to the "theory of basic structure", which includes the rule of law embodied in Article 14, Free and fair elections and judicial review to examine the validity of Clause (4) of Article 329-A, which was inserted by the Constitution (39th Amendment) Act, 1975.

Facts of the Case: The appellant in the instant case was Mrs. Indira Gandhi, the then Prime Minister of India. In pursuance of the notification dated 27.1.1971 for Elections of the Lok Sabha, she filed her nomination papers on 1.2.1971 for Rae Bareli Constituency in Uttar Pradesh (as a candidate of the Indian National Congress (R). The polling took place on 1st, 3rd and 5th March, 1971 and she (Mrs. Indira Gandhi) was declared elected with a good majority (by a margin of over 1,80,000 votes) defeating her nearest rival, Raj Narain (a candidate of the Samyukta Socialist Party).

Raj Narain filed an election petition in Allahabad High Court against Mrs. Gandhi, alleging her corrupt practices and misuse of the political power (viz. taking assistance from the Armed forces and other Government Officials, misuse of Government Vehicles, Helicopters, Aeroplanes etc.).

While the petition was pending before the Allahabad High Court, the President of India issued an ordinance under Section 77 of the Representation of the People Act, 1951, which was replaced by the Representation of the People (Amendment) Act, 1974. It aims to protect Mrs. Gandhi from the misuse of her political power as it exempted her from the jurisdiction of the High Courts. Raj Narain challenged the validity of the Act of 1974. The Court decided in favour of Raj Narain and struck down the validity of the Act. To nullify the judgment, the Parliament passed "the Election Laws (Amendment) Act, 1975." Sec.8-A of the Act empowers the President to disqualify a person found guilty of indulging in corrupt practices. Further, to have the Constitutional validity, the Parliament passed the Constitution (39th Amendment) Act, 1975. The 39th Amendment inserted a new Article 329-A to nullify the judgment of the Allahabad High Court.

Mrs. Gandhi filed an appeal before the Supreme Court against the Judgment of the Allahabad High Court, which invalidated her election to the Lok Sabha, contending that the courts had no jurisdiction basing on the above Acts passed by the President. The above Acts nullify the effect of the High Court Judgment and also withdrawing the jurisdiction of all courts including the Supreme Court over disputes relating to elections involving the Speaker and the Prime Minister including the present appeal pending before the Supreme Court.

Clause (4) of Article 329-A is directly concerning this appeal stated that no law made prior to the commencement of 39th Amendment, in so far as it related to election petition would apply or would deemed to have applied to election of the Prime Minister

to either House of Parliament. It further provided that such election would not be deemed to be void or ever to have become void and that notwithstanding any decision of any Court before 39th Amendment, declaring such election to be void, such election would continue to be valid.

Judgment: The Supreme Court unanimously struck down Clause (4) of Article 329-A. The Court thus got an occasion to elaborate the meaning of the expression "basic structure' of the Constitution. The majority of the Supreme Court, declared the following features as constituting the basic structure of the Constitution:

a) Judicial review;

b) Free and fair elections;

c) Rule of law; and

d) Right to equality.

3. *S.P. Gupta v. Union of India,* AIR 1982 SC 149.

Answer:

This case is popularly known as "the Judges Transfer Case." It refers to power of the Executive to appoint and transfer the Judges. It also attracts the independence of judiciary.

Clause (1) of Article 222 provides that "a Judge of one High Court may be transferred to another High Court by the President after consultation with the Chief Justice of India."

The President in exercise of his executive power appoints the Judges of the Supreme Court (Article 124) and the Judges of the High Courts (Article 217). However, he exercises his executive power on the advice of the Council of Ministers.

Facts of the Case: In the instant case, the Union Law Minister issued a circular to the Chief Ministers of the State to obtain the consent of the additional Judges of their High Courts

and of the persons, proposed to be appointed as the Judges of High Court. In pursuance of the circular, the President under Article 222(1) transferred two Judges namely Justice M.M. Ismail, the then Chief Justice of Madras High Court as the Chief Justice of the Kerala High Court and Justice K.B.N. Singh, the then Chief-Justice of Patna as the Chief Justice of the Madras High Court. The transfer of Judges and appointment of Judges gave room for great controversy and a number of public interest litigation petitions were filed in various High Courts. All the petitions were transferred to the Supreme Court for disposal. The petitioner in the instant case was a practicing Advocate of the Supreme Court.

Questions Involved: The questions involved in the instant case are:

1. Whether the circular issued by the Union Law Minister is valid and affects independence of judiciary?
2. Whether a public interest litigation petition is maintainable?
3. Whether the word 'Consultation' in Article 124(2) is the same as the meaning of the word consultation in Articles 212 and 222 of the Constitution?
4. Validity of transfer of Judges from one High Court to another?

Judgment: A Seven Judge Bench of the Supreme Court by a 4:3 held:

1. that the circular letter of the Union Law Minister was valid and it did not affect the independence of judiciary and that it could be pursued as a policy in the interest of national integration.
2. that any member of the public having 'sufficient interest' can approach the Court for enforcing constitutional or legal rights of other persons and redressal of a common grievance. Public

interest litigation means "any public spirited citizen can move/ approach the court for the public cause (in the interest of the public or public welfare) by filing a petition." Hence, the petition filed by the petitioner in the instant case is maintainable.

3. that the meaning of the word 'consultation' in Article 124(2) is the same as the meaning of the word "consultation" in Article 212 and Article 222 of the Constitution. The only ground on which the decision of the Government can be challenged is that is based on *mala fide* and irrelevant consideration, that is, when constitutional functionaries expressed an opinion against the appointment.

4. that the power of transfer of Judges must be exercised in public interest and the transfers cannot be done by way of punishment. The expression "Judge" in Article 222(1) includes 'Chief Justice' and accordingly, the court upheld the transfer of the Chief Justice of Patna High Court to the Madras High Court.

4. *Supreme Court Advocates-on-Record Association v. Union of India,* (1993) 4 SCC 441: AIR 1994 SC 268.

Answer:

This case is popularly known as Appointment/Transfer of Judges case. It refers to judicial supremacy in appointment of the Judges of the Supreme Court and High Courts, so that the executive element in the appointment process is reduced to the minimum and political influence is eliminated.

Facts of the Case: Mr. Subhash Sharma, an Advocate of the Supreme Court and the Supreme Court Advocates-on-Record Association filed public interest litigation petitions under Article 32 in the Supreme Court, praying the Court to fill up the vacancies of Judges in the Supreme Court and High Courts and the

appointment of Chief Justice of India shall be made on the basis of seniority.

Questions: The questions/issues involved in the instant case are:

1. Judicial Supremacy or primacy to the opinion of the Chief Justice of India in the matter of appointment of the Judges of the Supreme Court and High Courts (Articles 124(2), 217(1) and 222(1) of the Constitution).
2. Transfer of Judges of the High Court (Article 222(1)).

Judgment: A Nine-Judge Bench of the Supreme Court by a 7:2 majority overruled its earlier decision in *S.P. Gupta v. Union of India,* (AIR 1982 SC 149: Popularly known as Judges' Transfer Case) and laid down the detailed guidelines governing the appointment and transfer of Judges as enumerated hereunder:

1. The opinion of the Chief Justice of India (CJI) has primacy in the matter of appointment of the Supreme Court and the High Court Judges.
2. The opinion of the CJI means the opinion formed by him collectively i.e., after taking into account views of his senior colleagues. The opinion given by the CJI in the consultative process has to be formed taking into account the views of the two senior most Judges of the Supreme Court. The CJI is also expected to ascertain the views of the senior most Judge of the Supreme Court whose opinion is likely to be significant in adjudging the suitability of the candidate, by reason of the fact that he has come from the same High Court or otherwise. The opinion of the CJI is not merely his individual opinion, but an opinion formed collectively by a body of men at the apex level in the judiciary.
3. Initiation of the proposal for appointment in the case of the Supreme Court must be by the CJI and in the case of a High Court by the Chief Justice of that High Court.

4. *Iner-se* seniority amongst Judges in their High Court and their combined seniority on all India basis is of admitted significance in the matter of future prospects. Unless there be any strong cogent reason to justify a departure, that order of seniority must be maintained between them while making their appointment to the Supreme Court.
5. All consultations with everyone involved including all the Judges consulted must be in writing.
6. In the event of conflicting opinions by the Constitutional functionaries, the opinion of the judiciary symbolised by the views of the CJI and formed in the manner indicated has primacy.
7. No appointment of any Judge to the Supreme Court or any High Court can be made, unless it is in conformity with the opinion of the CJI.
8. In exceptional cases alone, for stated strong cogent reasons, disclosed to the CJI, indicating that the recommendee is not suitable for appointment, that appointment recommended by the CJI may not be made.

Further, the Court by majority laid down that the appointment to the office of the Chief Justice of India should be made on the basis of seniority. The senior most-Judge considered suitable to hold the office be appointed as the Chief Justice of India. The proposal for appointment of the Chief Justice of India should be initiated/ made in advance by the outgoing Chief Justice of India.

The practice of appointing senior most Judge as the Chief Justice of India had been followed since the commencement of the Constitution in 1950. However, on April 25, 1973, the President appointed Justice A.N. Ray as the Chief Justice of India ignoring three seniors (to Justice A.N. Ray) namely, Justice J.M. Shelat, Justice K.S. Hegde and Justice A.N. Grover.

Principles: The principles laid down in the instant case are: -

1. The President of India, in exercise of his executive power shall appoint/transfer the Judge with the consent of the Chief Justice of India.
2. "To have an independent judiciary to meet all challenges, unbending before all authorities and to uphold the imperatives of the Constitution at all times, thereby preserving the judicial integrity, the person to be elevated to the judiciary must be possessed with the highest reputation for independence, uncommitted to any prior interest, loyalty and obligation and prepared under all circumstances or eventuality to pay any price, bear any burden and to meet any hardship and always wedded only to the principles of the Constitution and 'Rule of Law'. If the selectee bears a particular stamp for the purpose of changing the cause of decisions bowing to the diktat of his appointing authority, then the independence of judiciary cannot be secured notwithstanding the guaranteed tenure of office, rights and privileges, safeguards, conditions of service and immunity."
3. "The argument that the independence of judiciary is satisfactorily secured by the constitutional safeguard of the office that a Judge holds and guarantees of the service conditions alone and not beyond that, is untenable. The constitutional assurances are not be all and end all. In addition to them, one other basic and inseparable vital condition is absolutely necessary for timely securing the independence of judiciary; and that concerns the methodology followed in the matter of sponsoring, selecting and appointing a proper and fit candidate to the higher judiciary."
4. "In this context the mandate of Article50 is relevant, being one of the fundamental principles of governance of the country and constitutionally binding on the Government, the latter is

obviously obliged voluntarily to refrain from any interference in judicial appointments and reduce its role to one which is purely formal or ceremonial, ensuring that the decisive factor is the wish and will of the judicial family. In fact, Article 50 has been referred to in various decisions by the eminent Judges of the Supreme Court while discussing the concept of independence of higher or superior judiciary and thereby highlighted and laid stress on the basic principles and values underlying Article 50 in safeguarding the independence of the judiciary."

5. *Kesavananda Bharati v. State of Kerala*, AIR 1973 SC 1461.

Answer:

This case is of great importance and is popularly known as "Fundamental Rights Case".

Facts of the Case in brief: The petitioner in the instant case, challenged the validity of the Kerala Land Reforms Act, 1963 passed by the State Government as unconstitutional. He contended that the impugned Act infringed/violated his fundamental rights guaranteed under Articles 14, 19(1)(f), 25, 26 and 31.

While the case was pending in the Supreme Court, the Parliament passed three amendments viz., the Constitution (24th Amendment) Act, 1971; the Constitution (25th Amendment) Act, 1971; and Constitution (29th Amendment) Act, 1972. The 24th Amendment has amended Article 368, which confers on the Parliament to amend the Constitution. It (24th Amendment) lays down power as well as procedure of the Amendment. So, the Parliament may amend by way of addition, variation or repeal any provision of the Constitution. The 25th Amendment inserted a new Article 31-C which provides that the law passed for giving effect to the directive principles specified in (b) and (c) of

Article 39 cannot be challenged on the ground that it is inconsistent with or takes away or abridges any of the right guaranteed in Articles 14, 19 and 31. The 29th Amendment inserted two Kerala Land Reforms Act, in the Ninth Schedule of the Constitution.

As the above amendments would defeat his claim, the petitioner has amended his petition and challenged the validity of the 24th, 25th and 29th Amendments.

Questions Involved: The questions involved in the instant case are:

1. Whether the power of the Parliament under Article 368 to amend the Constitution is limited or unlimited.
2. Whether the amending power under Article 368 extends to basic elements/features/structure of the Constitution; and
3. What constitutes basic features/structure?

Judgment: The Supreme Court, by majority of Seven Judges upheld the validity of the Constitution 24th, 25th and 29th Amendments and overruled its earlier decision in *Golaknath's Case (Golaknath v. State of Punjab,* AIR 1971 SC 143). The Court laid down:

1. That the power of Parliament under Article 368 is unlimited and can amend any part of the Constitution including the preamble.
2. That the amending power should not affect the basic features of the Constitution. In other words, the Parliament, by exercising its amending power under Article 368 should not destroy the basic features/elements of the Constitution.
3. The 'theory of basic structure', which envisages that the basic elements or basic features of the Constitution should not be curtailed/destroyed. But, the court did not define the concept of "basic structure" nor provided any guidelines so as to identify

'what constitutes basic structure'? However, the court in this case has recognised the following as basic features of the Constitution.

1. Republican and Democratic form of Government.
2. Secular character of the Constitution.
3. Supremacy of the Constitution.
4. Separation of powers between the legislature, the executive and the judiciary.
5. Federal character of the Constitution.
6. Sovereignty of the Country.
7. The dignity of the individual.
8. Freedom and basic rights in Part-III.
9. Welfare or economically just society as per the Principles under Part-IV Egalitarian Society.
10. Justice, Social, Economic and Political.
11. Liberty of thought, expression, belief, faith and worship.
12. Equality of status and opportunity.
13. Parliament with Lok Sabha and Rajya Sabha.

6. *Minerva Mills Ltd. V. Union of India,* AIR 1980 SC 1978.

Answer:

Instant case refers to power of Parliament to amend the Constitution under Article 368 of the Constitution. It was laid down in this case that harmony (balance) between Fundamental Rights (Part-III) and Directive Principles of State Policy (Part-IV) forms part of the basic features of the Constitution.

Facts of the Case: The petitioners in the instant case are the shareholders and creditors of the Minerva Mills Ltd. In pursuance of "the Sick Textile Undertakings (Nationalisation) Act, 1974, passed by the Central Government, Minerva Mills Ltd., was

nationalised. The petitioners challenged the validity of the impugned Act as it violated Articles 14, 19(1)(f) & (g) and 31(2) of the Constitution. The petitioners also challenged the constitutional validity of the Constitution (39th) Amendment Act, 1975 and Sections 4 and 55 of the Constitution (42nd Amendment) Act, 1976 on the ground that the Amendments would destroy the basic features of the Constitution. It was contended that Article 31-C, which was inserted by the Constitution (25th Amendment) Act, 1971 as amended by Sec.4 of the 42nd Amendment would destroy basic features of the Constitution.

Judgment: The Supreme Court by 4:1 majority struck down Article 31-C as amended by Sec.4 of the 42nd Amendment, as unconstitutional on the ground that it destroys the "basic features" of the Constitution. The Court held that Sec.4 of the 42nd Amendment was beyond the amending power of the Parliament and was void since it destroyed the basic features of the Constitution by a total exclusion of challenge to any law on the ground that it was inconsistent with or took away or abridged any of the rights conferred by Article 14 or 19 of the Constitution. The majority observed that the Constitution is founded on the bedrock of the balance between Part-III and Part-IV. To give absolute primacy to one over the other is to disturb the harmony of the Constitution which is the essential feature of the basic structure. The Court held that the unamended Article 31-C is valid as it does not destroy any of the basic features of the Constitution. The unamended Article 31-C gives protection to a defined and limited categories of laws, i.e., specified in Articles 39(b) and (c).

Principles: The principles involved in the instant case are:

1. Sec. 4 of the Constitution 42nd Amendment Act is beyond the amending power of the Parliament and is void since it damages the basic or essential features of the Constitution, and takes away or abridges any of the rights conferred by Article 14 or Article 19 of the Constitution.

2. Sec.55 of the Constitution 42nd Amendment Act is beyond the amending power of the Parliament and is void since it removes all limitations on the power of the Parliament to amend the Constitution.

3. The validity of Clauses (2) to (6) of Article 19 will be gravely imperilled because those clauses will also then be liable to be struck down as abrogating the rights conferred by Article 19(1) which are an essential feature of the Constitution.